

(21,912.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 164.

HAMILTON H. HENDRICKS, PLAINTIFF IN ERROR,

v.s.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF OREGON.

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1 UNITED STATES OF AMERICA,
District of Oregon, ss:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Oregon, wherein Hamilton H. Hendricks is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 28th day of Sept., 1909.

CHAS. E. WOLVERTON, *Judge.*

2 UNITED STATES OF AMERICA,
District of Oregon, ss:

Due and legal service of the attached and foregoing citation, hereby accepted and admitted at Portland, in said District, this 28th day of September, 1909.

JOHN McCOURT,
United States District Attorney, for the United States.

3 [Endorsed:] No. 2908. In the Circuit Court of the United States for the District of Oregon. United States of America, Pl'ff, vs. Hamilton H. Hendricks, Def't. Citation. Filed September 28, 1909. G. H. Marsh, Clerk.

4 In the Supreme Court of the United States.

No. —.

HAMILTON H. HENDRICKS, Plaintiff in Error,
vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the Circuit Court of the United States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before

the Honorable William H. Hunt, one of you, between The United States of America, Plaintiff and Defendant in Error, and Hamilton H. Hendricks, Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date hereof, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this September 28, 1909.

[Seal United States Circuit Court, Oregon.]

G. H. MARSH,
*Clerk of the Circuit Court of the United
States for the District of Oregon.*

[Endorsed:] In the Supreme Court of the United States. Hamilton H. Hendricks, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed September 28, 1909. G. H. Marsh, Clerk, United States Circuit Court, District of Oregon.

5 In the Circuit Court of the United States for the District of
October, October Term, 1904.

Be it remembered, That on the 8th day of February, 1905, there was duly filed in the Circuit Court of the United States for the District of Oregon, an Indictment, in words and figures as follows, to wit:

6 In the Circuit Court of the United States of America for the
District of Oregon, of the October Term, in the Year of Our
Lord Nineteen Hundred and Four.

DISTRICT OF OREGON, ss:

The grand jurors for the United States of America, inquiring for the District of Oregon, upon their oath present, that Hamilton H. Hendricks, late of the County of Wheeler, in the said district, on the fifteenth day of January, in the year of our Lord nineteen hundred and five, at and within the said County of Wheeler, in the said district, unlawfully did wilfully and corruptly suborn, in-

stigate and procure one George W. Hawk to appear in person before them the said grand jurors, then and from thence hitherto sitting at the city of Portland, in the said district, as a grand jury of the Circuit Court of the said United States for the said district, and, amongst other matters, inquiring into certain criminal violations of the laws of the said United States relating to the public lands and the disposal of the same, and the unlawful fencing thereof, which had then lately before been committed within the said district, and to take his oath before the said grand jury, and upon his oath so taken to testify, depose and swear before the said grand jury in substance and to the effect that when he the said George W. Hawk made his application dated October 19, 1898, and filed in the land office of the said United States at The Dalles, Oregon, on October 21, 1898, to enter certain public lands known and described as the southeast quarter of the southeast quarter of section two, the east half of the northeast quarter of section eleven, and the southwest quarter of the northwest quarter of section twelve, in township seven south and range twenty-two east, reference being had to the Wil-

lamette meridian and base line, as a homestead, under the laws of the said United States concerning homesteads, the same was honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that he the said George W. Hawk was not acting as agent of any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land so entered, or any part thereof, or the timber thereon; that he was not applying to enter the said lands for the purpose of speculation, but in good faith and to obtain a home for himself; that he had not made, and would not make, any agreement or contract with any person or persons, corporation or syndicate, by which the title which he should acquire from the said United States in the said lands would inure to the benefit of any person except himself, and that he himself paid the fees required by law to be paid upon the filing of such application;—that when he the said George W. Hawk, on the second day of March, in the year nineteen hundred, subscribed and swore to his affidavit and testimony of final proof of settlement upon and cultivation of the said lands, he had therefore, to wit, in the month of April, 1899, commenced his residence on the said lands, and had not sold, conveyed or mortgaged any portion of the said lands: And thereupon the said George W. Hawk, in consequence and by means of the said willful and corrupt subornation, instigation and procurement of the said Hamilton H. Hendricks, afterwards, to wit, on the twenty-third day of January, in the year nineteen hundred and five, in the said district, did appear in person before the said grand jury, at Portland aforesaid, and then and there was in due manner sworn by the foreman thereof, and then and there took his the said George W. Hawk's oath before the said grand jury that he would testify truly, and true answers make to all questions which should be put to him, before the said grand jury; the said grand jury then and there being a tribu-

nal having due and competent authority to administer the said oath to the said George W. Hawk in that behalf, and the matter in which he was so sworn and took his oath as last aforesaid being then and there a case in which a law of the United States then authorized an oath to be administered: And it then and there, at and upon the taxing of the said oath by the said George W. Hawk before the said grand jury as aforesaid, became and was a material question whether, when he so made and filed his said application to enter the said lands as a homestead as aforesaid, the same was honestly and in good faith made for the purpose of actual settlement and cultivation, and whether it was made for the benefit of any other person, persons, or corporation, and whether he the said George W. Hawk was acting as agent of any person, corporation, or syndicate in making such entry, and whether in making his said entry he was in collusion with any person, corporation, or syndicate to give them the benefit of the land so entered, or any part thereof, or the timber thereon, and whether he was not applying to enter the said lands for the purpose of speculation, rather than in good faith to obtain a home for himself, and whether he had not made, and would not make, an agreement or contract with some person or persons, corporation or syndicate, by which the title which he should acquire from the said United States in the said lands would inure to the benefit of some person except himself, and whether he the said George W. Hawk himself paid the fees aforesaid,—and whether, when he the said George W. Hawk so subscribed and swore to his said affidavit and testimony of final proof

of settlement upon and cultivation of the said lands as aforesaid, he had, in the month of April, 1899, or at any time commenced his residence on the said lands, and whether he had sold, conveyed or mortgaged any portion of the said lands and whether he himself paid the fees required by law to be paid upon the making of such final proof. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said George W. Hawk, being so sworn as aforesaid, then and there, upon his oath so taken as aforesaid, before the said grand jury (it being a tribunal having such due and competent authority as aforesaid,) falsely, willfully and corruptly, and contrary to his oath so taken, did testify, depose and swear (amongst other things) in substance and to the effect that when he so made and filed his said application to enter the said lands as a homestead as aforesaid, the same was honestly and in good faith made for the purpose of actual settlement and cultivation, and was not made for the benefit of any other person, corporation or syndicate in making such entry, that in making his said entry he was not in collusion with any person, persons, corporation or syndicate to give them the benefit of the lands so entered, or any part thereof, or the timber thereon, that he was not applying to enter the said lands for the purpose of speculation, but in good faith to obtain a home for himself, and had not made, and would not make, any agreement or contract with any other person or persons, corporation or syndicate, by which the title which he should acquire from the said United

States in the said lands would inure to the benefit of any person except himself, that he himself paid the fees required by law to be paid upon the filing of the said application,—and that when he so subscribed and swore to his said affidavit and testimony of final proof of settlement upon and cultivation of the said lands as aforesaid, he had before then, to wit, in the month of April,

10 1899, commenced his residence upon the said lands, and had not sold, conveyed or mortgaged any portion of the said lands; and that he himself paid the fees required by law to be paid upon the making of the said final proof; whereas, in truth, as the grand jurors aforesaid, upon their oath aforesaid, charge the fact to be, at the time when the said George W. Hawk so made and filed his said application, the same was not honestly and in good faith made for the purpose of actual settlement and cultivation, and was made for the benefit of another person and a corporation, to wit, the said Hamilton H. Hendricks and The Butte Creek Land Live Stock and Lumber Company, a corporation then existing under that name, and he the said George W. Hawk was acting as agent of the said Hamilton H. Hendricks and the said corporation in making the said entry, and was acting in collusion with the said Hamilton H. Hendricks, who was then the secretary and treasurer of the said corporation, to give the said Hamilton H. Hendricks and the said corporation the benefit of the lands so entered, and did apply to enter the said lands for the purpose of speculation, rather than in good faith to obtain a home for himself, and had made, and would make, an agreement and contract with the said Hamilton H. Hendricks by which the title which he should acquire from the said United States would be conveyed to the said Hamilton H. Hendricks and inure to the benefit of the said Hamilton H. Hendricks and the said corporation and its shareholders, and did not himself pay any of the fees required by law to be paid upon the filing of the said application,—and when he the said George W. Hawk so subscribed and swore to his affidavit and testimony of final proof of settlement upon and cultivation of the said lands as aforesaid, he had never commenced his residence upon the said lands, and had

11 sold and conveyed all of the said lands to another, to wit, to the said Hamilton H. Hendricks, and did not himself pay any of the fees required by law to be paid upon the making of the said final proof; and whereas in truth and in fact the said George W. Hawk, at the time when he was so sworn and took his oath as aforesaid before the said grand jury, did not believe to be true the said matters so by him there testified, deposed and sworn as herein above specified; and whereas in truth and in fact the said Hamilton H. Hendricks, at the time and place when and where he so suborned, instigated and procured the said George W. Hawk to take his said oath and to testify, depose and swear falsely as aforesaid, well knew that the said George W. Hawk did not believe to be true the said matters which he the said Hamilton H. Hendricks so then and there suborned, instigated and procured him to testify, depose and swear before the said grand jury as aforesaid; and whereas in truth and in fact the said Hamilton H. Hendricks did not then be-

lieve to be true the said matters which he so suborned, instigated and procured the said George W. Hawk falsely to testify, depose and swear as herein above specified. And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that the said Hamilton H. Hendricks, in manner and form aforesaid, willfully and corruptly did suborn, instigate and procure the said George W. Hawk to commit wilful and corrupt perjury; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

2. And the grand jurors aforesaid upon their oaths aforesaid, do further present, that the said Hamilton H. Hendricks, on the said fifteenth day of January, in the same year nineteen hundred and five, at and within the said County of Wheeler, in the said District of Oregon, unlawfully did wilfully and corruptly suborn, 12 instigate and procure one Clyde Brown to appear in person before them the said grand jurors, then and from thence hitherto sitting at the city of Portland, in the said district, as a grand jury of the Circuit Court of the said United States for the said district, and, amongst other matters, inquiring into certain criminal violations of the laws of the said United States relating to the public lands and the disposal of the same, and the unlawful fencing thereof, which had then lately before been committed within the said district, and to take his oath before the said grand jury, and upon his oath so taken to testify, depose and swear before the said grand jury in substance and to the effect that when he the said Clyde Brown made his application, dated October 21, 1899, and filed in the land office of the said United States at The Dalles, Oregon, on October 24, 1899, to enter certain public lands known and described as the southeast quarter of the northeast quarter of section fifteen, and the south half of the northwest quarter and the northeast quarter of the northwest quarter of section fourteen, in township seven south and range nineteen east, reference being had to the Willamette Meridian and base line, as a homestead, under the laws of the said United States concerning homesteads, the same was honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation; that he the said Clyde Brown was not acting as agent of any person, corporation or syndicate in making such entry, not in collusion with any person, corporation or syndicate to give them the benefit of the land so entered, or any part thereof, or the timber thereon; that he was not applying to enter the said lands for the purpose of speculation, but in good faith and to obtain a home for himself; that he had not made, and would not make, any agreement or contract with any person or persons, corporation or syndicate, by which the title which 13 he should acquire from the said United States in the said lands would inure to the benefit of any person except himself, and that he himself paid the fees required by law to be paid upon the filing of such application. And thereupon the said Clyde Brown, in consequence and by means of the said willful and corrupt subornation, instigation and procurement of the said Hamil-

a H. Hendricks, afterwards, to wit, on the twenty-third day of January, in the same year nineteen hundred and five, in the said district, did appear in person before the said grand jury, at Portland aforesaid, and then and there was in due manner sworn by the foreman thereof, and then and there took his the said Clyde Brown's oath before the said grand jury that he would testify truly, and true answers make to all questions which should be put to him, before the said grand jury; the said grand jury then and there being a tribunal having due and competent authority to administer the said oath to the said Clyde Brown in that behalf, and the matter in which he was so sworn and took his oath as last aforesaid being then and there a case in which a law of the United States then authorized an oath to be administered: And it then and there, at and upon the taking of the said oath by the said Clyde Brown before the said grand jury as aforesaid, became and was a material question whether, when he so made and filed his said application to enter the said lands as a homestead as aforesaid, the same was honestly and in good faith made for the purpose of actual settlement and cultivation, and whether it was made for the benefit of any other person, persons, or corporation, and whether he the said Clyde Brown was acting as agent of any person, corporation, or syndicate in making such entry, and whether in making his said entry he was in collusion with any person, corporation, or syndicate to give them the benefit of the land so entered, or any part thereof, or the timber thereon, and whether he was not applying to enter the said lands for the purpose of speculation, rather than in good faith to obtain a home for himself, and whether he had not made, and would not make, an agreement or contract with some person or persons, corporation or syndicate, by which the title which he should acquire from the said United States in the said lands would inure to the benefit of some person except himself, and whether he the said Clyde Brown himself paid the fees aforesaid. And the grand jurors aforesaid upon their oaths aforesaid, do further present, that the said Clyde Brown, being so sworn as aforesaid, then and there, upon his oath so taken as aforesaid, before the said grand jury (it being a tribunal having such due and competent authority as aforesaid) falsely, wilfully and corruptly, and contrary to his oath so taken, did testify, depose and swear (amongst other things) in substance and to the effect that when he so made and filed his said application to enter the said lands as a homestead as aforesaid, the same was honestly and in good faith made for the purpose of actual settlement and cultivation, and was not made for the benefit of any other person, persons, or corporation, and that he was not an agent of any person, corporation or syndicate in making such entry, that in making his said entry he was not in collusion with any person, corporation or syndicate to give them the benefit of the lands so entered, or any part thereof, or the timber thereon, that he was not applying to enter the said lands for the purpose of speculation, but in good faith to obtain a home for himself, and had not made, and would not make, any agreement or contract with any other

person or persons, corporation or syndicate, by which the title which he should acquire from the said United States in the said lands would inure to the benefit of any person except himself, and that he himself paid the fees required by law to be paid upon the filing of the said application; whereas, in truth, as the

15 grand jurors aforesaid, upon their oath aforesaid, charge the fact to be, at the time when the said Clyde Brown so made and filed his said application, the same was not honestly and in good faith made for the purpose of actual settlement and cultivation, and was made for the benefit of another person and a corporation, to wit, one Clarence B. Zachary and The Butte Creek Land Live Stock and Lumber Company, a corporation then existing under that name, and he the said Clyde Brown was acting as agent of the said Clarence B. Zachary and the said corporation in making the said entry, and was acting in collusion with the said Clarence B. Zachary, who was then the manager of the said corporation, to give the said Clarence B. Zachary and the said corporation, the benefit of the lands so entered, and did apply to enter the lands for the purpose of speculation, rather than in good faith to obtain a home for himself, and had made, and would make, an agreement and contract with the said Clarence B. Zachary by which the title which he should acquire from the said United States would be conveyed to the said Clarence B. Zachary and inure to the benefit of the said Clarence B. Zachary, and the said corporation and its shareholders, and did not himself pay any of the fees required by law to be paid upon the filing of the said application; and whereas in truth and in fact the said Clyde Brown, at the time when he was so sworn and took his oath as aforesaid before the said grand jury, did not believe to be true the said matters so by him there testified, deposed and sworn as herein above specified; and whereas in truth and in fact the said Hamilton H. Hendricks, at the time and place when and where he so suborned, instigated and procured the said Clyde Brown to take his said oath and to testify, depose and swear falsely as aforesaid, well knew that the said Clyde Brown did not believe to be true the said matters which he the said Hamilton H. Hendricks so then and there suborned, instigated and procured him to testify, depose and swear before the said grand jury as aforesaid; and whereas in truth and in fact the said Hamilton H. Hendricks did not then believe to be true the said matters which he so suborned, instigated and procured the said Clyde Brown falsely to testify, depose and swear as herein above specified. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Hamilton H. Hendricks, in manner and form in this count of this indictment aforesaid, wilfully and corruptly did suborn, instigate and procure the said Clyde Brown to commit wilful and corrupt perjury; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

FRANCIS J. HENEY,
United States Attorney.

Name of witnesses: George W. Hawk, Clyde Brown.

A true bill.

W. H. H. WADE, *Foreman*.

Filed in open court this eighth day of February, A. D. 1905.

J. A. SLADEN, *Clerk*.

By G. H. MARSH, *Deputy*.

17 And afterwards, to wit, on Wednesday, the 8th day of February 1905 the same being the 110th Judicial day of the Regular October, 1904, Term of said Court; Present: the Honorable Charles B. Bellinger, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

18 In the Circuit Court of the United States for the District of Oregon.

FEBRUARY 8, 1905.

No. 2908.

THE UNITED STATES OF AMERICA

vs.

HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S. U. S.

Now, at this day, comes the Grand Jury impanelled herein and, through its foreman, presents to the Court an Indictment charging the above named defendant, Hamilton H. Hendricks, with subornation of perjury, in violation of Section 5393 of the Revised Statutes of the United States, endorsed "A true bill," which Indictment is received by the Court and ordered to be filed.

And, thereupon, on motion of Mr. Francis J. Heney, United States Attorney, it is ordered that the bail of the above named defendant be, and it is hereby, fixed at \$4000.00.

And, it is further ordered that the Clerk of this Court be, and he is hereby, authorized and directed to take and approve the bond of said above named defendant.

19 And afterwards, to wit, on the 27th day of April, 1905, there was duly filed in said Court, a demurrer to the indictment, in words and figures as follows, to-wit:

20 In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, Plaintiff,

vs.

HAMILTON H. HENDRICKS, Defendant.

Now comes the defendant, Hamilton H. Hendricks in person and by Alfred S. Bennett, his attorney, and having heard the indictment—

ment in said cause read, demurs to the first count of said indictment and says:

1. That the said count of said indictment and the matters and facts therein contained in manner and form as the same are stated, are not sufficient in law and are not sufficient to constitute a crime and are not direct and certain, and that he, the said Hamilton H. Hendricks is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore for want of a sufficient count and indictment in this behalf the said Hamilton H. Hendricks prays judgment as to said count: That the same be quashed and adjudged insufficient, and that he may be dismissed and discharged from answering the same.

2. And the said Hamilton H. Hendricks appears in his own proper person and by Alfred S. Bennett, his attorney, and demurs to the second count of said indictment and says: that the said count of said indictment and the matters and facts therein contained, in manner and form as the same are stated and set forth in said indictment, are not sufficient in law and are not sufficient to constitute a crime and are not direct and certain, and that he, the said Hamilton H. Hendricks is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore, for want of a sufficient count and indictment in this behalf, the said Hamilton H. Hendricks prays judgment as to said count: that the same be quashed and adjudged insufficient, and that he may be dismissed and discharged from answering the same.

3. And the said Hamilton H. Hendricks appears in his own proper person and by Alfred S. Bennett, his attorney, and demurs to the whole of said indictment and says: That the said indictment and the matters and facts therein contained, in manner and form as the same are stated and set forth in said indictment, are not sufficient in law, and that said indictment improperly unites two separate and distinct offenses which cannot be properly joined in one indictment, and that said defendant, Hamilton H. Hendricks is not bound by the law of the land to answer the same and this he is ready to verify.

Wherefore, for want of a sufficient indictment, the said Hamilton H. Hendricks prays judgment that he may be dismissed and discharged from the said premises in the said indictment specified.

HAMILTON H. HENDRICKS,
Defendant.
 ALFRED S. BENNETT,
Att'y for Def't.

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, A. S. Bennett hereby certify that I am an attorney of the above entitled court, and that in my opinion said demurrer is well founded in law.

ALFRED S. BENNETT.

Filed Apr. 27, 1905.

J. A. SLADEN, *Clerk.*

22 And afterwards, to wit, on Monday, the 17th day of July, 1905 the same being the 73rd Judicial day of the Regular April, 1905, Term of said Court; Present: the Honorable John J. De Haven, United States District Judge for the Northern District of California, presiding, the following proceedings were had in said cause, to-wit:

23 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA

vs.

HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S., U. S.

JULY 17, 1905.

This cause was heard by the Court upon the demurrer of the defendant to the indictment herein, and was argued by Mr. Francis J. Heney, United States Attorney, and by Mr. Alfred S. Bennett, of counsel for said defendant; upon consideration whereof, it is ordered and adjudged that said demurrer be, and the same is hereby, overruled.

24 And afterwards, to wit, on Friday, the 27th day of July, 1906, the same being the 94th Judicial day of the Regular April, 1906, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

25 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA

vs.

HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S.

JULY 27, 1906.

Now, at this day, comes the above named plaintiff by Mr. Wm. C. Bristol, United States Attorney, and Mr. Francis J. Heney, Special Assistant to the Attorney General, and the defendant herein Hamilton H. Hendricks, in his own proper person and by Mr. A. S. Bennett, of counsel, and this being the day set for the trial of this cause,

now come the following named jurors to try the issue joined, to wit: M. E. Kandle, William Merchant, H. Johnson, J. E. Jack, Arthur G. Kyrk, Julius Kraemer, F. A. Mangold, Elmer Dixon, Thomas Perry, Cass Gibson, Bedford Laughlin, and Alfred Brownell, twelve good and lawful men of the District, who, being accepted by both parties, duly empanelled and sworn, proceed to hear the evidence adduced, and the hour of adjournment having arrived the further trial of this cause is continued until 9.30 A. M. of tomorrow, Saturday, July 28, 1906.

26 And afterwards, to wit, on Saturday, the 28th day of July, 1906, the same being the 95th Judicial day of the regular April, 1906, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to wit:

27 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA

VS.

HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S., U. S.

JULY 28, 1906.

Now, at this day, come the parties herein with and by their counsel as of yesterday, and the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until 9.30 A. M. of Monday, July 30, 1906.

28 And afterwards, to wit, on Monday, the 30th day of July, 1906, the same being the 96th Judicial day of the Regular April, 1906, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to wit:

29 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA

VS.

HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S., U. S.

JULY 30, 1906.

Now, at this day, come the parties hereto by and with their counsel as of Saturday, July 28, 1906, and the jury impanelled herein

being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived the further trial of this cause is continued until 9:30 A. M. of tomorrow, Tuesday, July 31, 1906.

30 And afterwards, to wit, on Tuesday, the 31st day of July, 1906, the same being the 97th Judicial day of the Regular April, 1906, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to wit:

31 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA

vs.

HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S., U. S.

JULY 31, 1906.

Now, at this day, come the parties hereto, by and with their counsel as of yesterday, and the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until 9:30 A. M., of Wednesday, August 1, 1906.

32 And afterwards, to wit, on Wednesday, the 1st day of August, 1906, the same being the 98th Judicial day of the Regular April, 1906, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

33 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA

vs.

HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S., U. S.

AUGUST 1, 1906.

Now, at this day, come the parties hereto by and with their counsel as of yesterday, and the jury impanelled herein being present

HAMILTON H. HENDRICKS VS.

and answering to their names, the trial of this cause is resumed; and the hour of adjournment having arrived the further trial of this cause is continued until 9:30 A. M. of Thursday, August 2, 1906.

34 And afterwards, to wit, on Thursday, the 2nd day of August, 1906, the same being the 99th Judicial day of the Regular April, 1906, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

35 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA
VS.

HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S., U. S.

AUGUST 2, 1906.

Now, at this day, come the parties hereto by and with their counsel as of yesterday, and the jury impanelled herein being present and answering to their names, the further trial of this cause is resumed, and the hour of adjournment having arrived the further trial of this cause is continued until 9:30 A. M. of tomorrow, Friday, August 3, 1906.

36 And afterwards, to wit, on Friday, the 3rd day of August, 1906, the same being the 100th Judicial day of the Regular April, 1906, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

37 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA
VS.

HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S., U. S.

AUGUST 3, 1906.

Now, at this day, come the parties hereto by and with their counsel as of yesterday, and the jury impanelled herein being present

and answering to their names, the trial of this cause is resumed; and the hour of adjournment having arrived the further trial of this cause is continued until 9:30 A. M. of tomorrow, Saturday, August 4, 1906.

38 And afterwards, to wit, on Saturday, the 4th day of August, 1906, the same being the 101st Judicial day of the Regular April, 1906, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

39 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA

vs.

HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S., U. S.

AUGUST 4, 1906.

Now, at this day, come the parties hereto by and with their counsel as of yesterday, and the jury impanelled herein being present and answering to their names, the trial of this cause is resumed; and the said jury having heard the evidence adduced, the arguments of counsel, and the charge of the Court, retire from the Court-room to consider of their verdict, and, after being out a short time, return into Court the following verdict, to wit: "We, the jury in the above entitled cause, find the defendant, Hamilton H. Hendricks, guilty as charged in the first count of the indictment. Wm. Merchant, Foreman," which verdict is received by the Court and ordered to be filed.

And, thereupon, it is ordered, that the defendant, Hamilton H. Hendricks, do appear for sentence in this Court on Saturday, August 11, 1906, at 9:30 A. M.

40 And Afterwards, to wit, on the 4th day of August, 1906, there was duly Filed in said Court, a verdict, in words and figures as follows, to wit:

41 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA
vs.
HAMILTON H. HENDRICKS.

We, the jury, in the above entitled cause, find the defendant Hamilton H. Hendricks, guilty as charged in the first count of the Indictment.

WM. MERCHANT, *Foreman*.

Filed August 4, 1906. J. A. Sladen, Clerk, by G. H. Marsh, Deputy.

42 And afterwards, to wit, on Wednesday, the 8th day of August, 1906, the same being the 104th Judicial day of the Regular April, 1906, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

43 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA
vs.
HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S., U. S.

AUGUST 8, 1906.

Now, at this day, comes the above named plaintiff by Mr. William C. Bristol, United States Attorney, and the defendant herein by Mr. A. S. Bennett, of counsel, and, thereupon, on motion of said defendant, it is ordered, that said defendant be, and he is hereby, allowed thirty days from this date in which to prepare and submit a bill of exceptions herein.

44 And afterwards, to wit, on Saturday, the 11th day of August, 1906, the same being the 106th Judicial day of the Regular April, 1906, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

45 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA
vs.
HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S., U. S.

AUGUST 11, 1906.

Now, at this day, on motion of Mr. William C. Bristol, United States Attorney, it is ordered that the time heretofore set for imposing sentence upon the above named defendant be, and the same is hereby continued to Wednesday, August 15, 1906.

46 And afterwards, to wit, on the 14th day of August, 1906, there was duly filed in said Court, a motion in arrest of judgment, in words and figures as follows, to wit:

47 In the Circuit Court of the United States of America for the District of Oregon.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
HAMILTON H. HENDRICKS, Defendant.

And now after verdict against the said Hamilton H. Hendricks, and before sentence, comes the said Hamilton H. Hendricks, by A. S. Bennett, his attorney and moves the court here to arrest judgment herein, and not pronounce the same, and that further proceedings against the defendant be dismissed, and that he be discharged and go hence without day.

This motion is based upon the ground that the indictment in this case does not charge a crime, and is insufficient and does not sufficiently describe the offense, "And does not inform the defendant of the nature and cause of the accusation," against him and is in violation of and insufficient under the Sixth Amendment to the Constitution of the United States.

ALFRED S. BENNETT,
Attorney for the Defendant.

Filed August 14, 1906, J. A. Sladen, Clerk.

48 And afterwards, to wit, on the 14th day of August, 1906, there was duly filed in said Court, a motion for new trial, in words and figures as follows, to wit:

- 49 In the Circuit Court of the United States of America for the District of Oregon.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
HAMILTON H. HENDRICKS, Defendant.

Now comes the defendant in the above entitled cause and moves the Court to set aside the verdict of guilty heretofore rendered and entered herein, and for a new trial in said cause, upon the following grounds:

First. That there was no sufficient evidence to justify the verdict in this, that there was no evidence that the testimony which was the basis of the alleged perjury and which is alleged to have been false was material to any matter pending before the grand jury, or that the matter which the grand jury was investigating was one of which said body had jurisdiction, and that the matter, if any, which the grand jury was investigating, was not any matter covered by the allegations of the indictment.

Second. That the Court erred in admitting evidence of the fencing of public lands not connected in any way with the Hawk claim as to which the perjury is alleged to have been committed, and in denying the motion to strike out the same.

Third. That the court erred in admitting any testimony upon an insufficient indictment over the objections and exceptions of the defendant.

50 Fourth. That the Court erred in admitting testimony over the objections and exceptions of the defendant as to alleged wrongful acquiring of public lands by the Butte Creek Land, Live Stock and Lumber Company, other than the lands of Hawk, the witness claimed to have been suborned.

Fifth. Errors of the Court in admitting other incompetent and immaterial evidence which was objected to and excepted to at the time.

Sixth. Errors of the Court in the matter of giving and refusing to give instructions to the jury which *was* objected to and *excepted* to by the defendant at the time.

Seventh. Error of the Court in refusing to direct a verdict of acquittal.

ALFRED S. BENNETT,
Attorney for the Defendant.

Filed August 14, 1906. J. A. Sladen, Clerk.

51 And afterwards, to wit, on Wednesday, the 15th day of August, 1906, the same being the 109th Judicial day of the Regular April, 1906, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

52 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA
vs.

HAMILTON H. HENDRICKS.

- Indictment, Section 5393, R. S., U. S.

AUGUST 15, 1906.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, Special Assistant to the Attorney General, and the defendant, Hamilton H. Hendricks, in his own proper person and by Mr. A. S. Bennett, of counsel, and this being the day heretofore set for imposing sentence upon said defendant, now, on motion of said plaintiff, it is ordered, that the time set for imposing said sentence upon said defendant be, and the same is hereby, continued to Saturday, August 18, 1906.

53 And afterwards, to wit, on Saturday, the 18th day of August, 1906, the same being the 112th Judicial day of the Regular April, 1906, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

54 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA
vs.

HAMILTON H. HENDRICKS.

Indictment, Section 5393, R. S., U. S.

AUGUST 18, 1906.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, Special Assistant to the Attorney General, and Mr. William C. Bristol, United States Attorney, and the defendant, Hamilton H. Hendricks, in his own proper person, and by Mr. A. S. Bennett, of counsel, and this being the day heretofore set for imposing sentence upon said defendant, on motion of said defendant, it is ordered that the time for imposing sentence herein be, and the same is hereby, continued until the further order of the *of this Court*.

And, thereupon, this cause comes on to be heard upon the motion in arrest of judgment, of said defendant, and was argued by counsel;

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on consideration whereof, it is now here ordered and adjudged, that said motion be, and the same is hereby, denied; and, thereupon, said defendant excepted to said decision and said exception is allowed by the Court.

And, on motion of said defendant, it is further ordered that said defendant be, and he is hereby, allowed 60 days from this date in which to prepare and submit a bill of exceptions herein.

55 And afterwards, to wit, on Tuesday, the 2nd day of October, 1906, the same being the 2nd Judicial day of the Regular October, 1906, Term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge for the District of Oregon, presiding, the following proceedings were had in said cause, to-wit:

56 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA

vs.

HAMILTON H. HENDRICKS.

OCTOBER 2, 1906.

Now, at this day, on motion of Mr. James Cole, Assistant United States Attorney, it is ordered that the time heretofore allowed the above named defendant, in which to prepare and submit a bill of exceptions herein, be, and the same is hereby, extended thirty days.

57 And afterwards, to wit, on the 23rd day of October, 1906, there was duly filed in said Court, a stipulation and order extending time to submit bill of exceptions, in words and figures as follows, to wit:

58 In the United States Circuit Court for the District of Oregon.

UNITED STATES OF AMERICA, Complainant,

vs.

H. H. HENDRICKS, Defendant.

It is hereby stipulated and agreed that the time for serving and filing the bill of exceptions in the above entitled cause may be extended until Nov. 15th, 1906.

W. C. BRISTOL,

Attorney for U. S. of America.

ALFRED S. BENNETT,

Attorney for Defendant.

En Route Oct. 2nd, 1906.

Based upon the above affidavit, it is ordered that defendant's time to file and serve proposed bill of exceptions be extended to Nov. 15th, 1906.

Dated Oct. 9th, 1906.

WM. H. HUNT, *Judge.*

Filed Oct. 23, 1906. J. A. Sladen, Clerk.

59 And afterwards, to wit, on Friday, the 3rd day of May, 1907, the same being the 23rd Judicial day of the Regular April, 1907, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

60 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA

vs.

HAMILTON H. HENDRICKS.

MAY 3, 1907.

Now, at this day, comes the above named plaintiff by Mr. William C. Bristol, United States Attorney, and the defendant by Mr. A. S. Bennett, of counsel, and, thereupon, said defendant presents to the Court his proposed bill of exceptions herein, and the said plaintiff presents to the Court certain amendments thereto; Whereupon, after arguments by counsel, It is ordered that said defendant do incorporate in his proposed bill of exceptions the said amendments of said plaintiff; and, thereupon, this being done, said bill of exceptions, as amended, is duly settled and signed by the Judge in open Court.

61 And Afterwards, to wit, on the 3rd day of May, 1907, there was duly filed in said Court, a Bill of Exceptions, in words and figures as follows, to wit:

62 In the Circuit Court of the United States for the District of Oregon.

U. S. OF AMERICA, Plaintiff,

vs.

HAMILTON H. HENDRICKS, Defendant.

Bill of Exceptions.

Be it remembered that the above entitled cause came on for hearing before the Honorable William H. Hunt, Judge, 26th day of July, 1906, the Government appearing by Honorable Francis J. Heney,

Special Assistant to the Attorney General of the United States, Honorable William Bristol, United States District Attorney, and the Defendant appearing by Alfred S. Bennett.

The Jury was duly empannelled and one J. A. Sladen was called as a witness and was about to be examined as a witness in said cause on behalf of the Government, whereupon the defendant by its attorney objected to the introduction of any testimony in the cause upon the ground that the indictment in this case does not set forth sufficient facts to charge a crime.

But the objection was overruled and to the ruling the defendant excepted and thereafter all the testimony in said cause was introduced under and subject to such objection ruling and exception.

And be it further remembered, that FRANCIS J. HENEY was called as a witness who testified as follows:

Q. Mr. Heney, were you in a position in 1904 and 1905, in January 1905, so as to know what the then Grand Jury of the Circuit Court of the United States for the District of Oregon had under investigation?

A. I was.

63 Q. What was your position?

A. I was Assistant United States Attorney for Oregon.

Q. You may state whether or not at that time one W. H. H. Wade was foreman, and matters of criminal violations of the land laws of the United States as to the disposal of the public lands in homestead matters, or the unlawful fencing of the same, or either, or both of those matters, was before that Grand Jury at that time?

A. Yes, sir, both were.

Q. Can you state whether or not there was involved in that investigation any matter pertaining to land in the Southeast quarter of the south east quarter of section 2, and the east half of the north east quarter of section 11, and the south west quarter of the northwest quarter of section 12 in township 7, south, range 22 east?

A. Yes, sir, that land was involved in a part of the investigation.

Q. Can you state whether or not the following described tract of land was involved as part of that same investigation: "The south-east quarter of the northeast quarter of section 15 and the south half of the northwest quarter and the northeast quarter of the northwest quarter of section 14 in township 7, south, range 19 east?"

A. Yes, sir, that land was involved in the same investigation.

Be it further remembered, that thereafter one W. H. H. WADE was called as a witness who testified that he was foreman of the Grand Jury and after testifying to the substance of the testimony of Hawk and to the manner of his giving it before the Grand Jury, etc., testified in relation to the matter which was under investigation as follows:

64 Q. What did he say, as to whether he had taken it up for himself or not?

A. Well, I can't give—I cannot remember the words that

he used, but it was—that he had taken it up for some other purpose; he had been induced or influenced by other parties to take it up, to take up the land.

Q. Do you know who the other parties were, that he was taking it up for, that he said he was?

A. I do not. I cannot; I do not bear in mind, just now, that is who the parties were—whether it was for—

Q. (Interrupting.) Do you remember who he said the land was to go to?

A. Oh, I don't just call to mind at present, what statement he made in regard to that.

Q. Do you recollect any of the parties it was to go to?

A. To this—to this company.

Q. Which company?

A. Why the Butte Creek Company; but I say, I could not remember who it was—who had made—who it was—the different ones—whether he named any different individual or not; I don't know about that.

Q. Were the names of certain individuals connected with that company, brought into the investigation?

A. Yes, sir.

Q. In regard to the company acquiring land, and in regard to the fencing of land?

A. Yes, sir.

Q. What names were they?

A. Hendricks, Steiwer and Zachary.

Q. Did any one of those parties appear before the Grand Jury?

65 A. Zachary appeared before the Grand Jury.

Q. Do you remember as to whether he stated, who composed the Butte Creek Company.

And thereafter, one V. W. ROXBETT was called as a witness who after testifying that he was a member of the Grand Jury in question and was present and heard the testimony of Hawk and what the substance of that testimony was, was questioned and testified as follows:

Q. Do you remember what it was that the Grand Jury was investigating at that time?

A. Why, it was in regard to fencing up those lands.

Q. What lands?

A. The land of the Butte Creek Land, Live Stock and Lumber Company.

Q. Yes? Do you remember whether it was investigating about the taking up of lands unlawfully by that company also?

A. Yes, sir.

And thereafter, Honorable FRANCIS J. HENEY was recalled and having testified that he was Assistant U. S. Attorney for the District of Oregon in January 1905 and was present before the Grand Jury as such District Attorney and having identified the following letters:

FOSSIL, OREGON, Jan. 8, 1905.

Hon. Francis J. Heney, Portland, Oregon.

DEAR SIR: In the matter of the injunction suit pending in the United States Circuit Court by the United States vs. The Butte Creek Land, Live Stock and Lumber Company, would say that I have not heard from my associate counsel in Portland for a long time; but I think the defendant will be willing for an injunction order to be made that will enjoin them from maintaining any enclosure so long as there is any government land therein, and to remove any and all fence that is at all on the government land. Just so the defendant is not prevented from fencing its own land in any manner it sees fit so long as it is not making any actual enclosure of government land, is all the *the* defendant will ask or has asked ever since Mr. Edward Dixon first examined its lands and fences. At that time he told W. W. Steiwer or Mr. Zachary, the president and foreman of the defendant what fencing or portions of fencing should be removed in order to satisfy the department, and they were removed accordingly. Some two thousand acres in one summer pasture was turned out to the public when there was only about a half section of government land inside, and it has ever since lain out, and will so long as any government land is inside. A few years ago it was supposed a person could fence his own land, even if he enclosed some government land, so long as fence was on his own land. But ever since I first learned of the decision of the Supreme Court of the United States I have counseled the defendant and all others who inquired that they could not enclose government land even if their fences were on their own land. So when Mr. Dixon was here, and instructed us what to do, we obeyed his orders; and if any part of the fence he said should be taken down has since been put up it has been without our knowledge or consent and against our express orders. Mr. C. B. Zachary the foreman and manager of the defendant has complained to us that in two or three instances the fences that he had taken down has been put up again; but informed us that immediately on discovering the same he tore them out again. We have no knowledge whether this was done by an enemy to get us into trouble, or by some person who did not want our stock on their range or did not want their own stock to scatter too far away from their own enclosures.

It is a very rough country where these complaints arose, and if the defendant opened its fences in some instances—as was the case—it only made a wider circle and took in more ranches of neighbors but left it technically an inclosure still, as it is several miles to public roads from our rough winter ranges, a few miles West of here. I am sure the defendant wants to do what is right, and not put the Government to any extra trouble over this pending suit.

Personally I have never been over much of this defendant's lands West of here, and I have not been over any of it in the last five years. And I know that Mr. Steiwer the president of this company has no more knowledge than I have of whether in any instance any

fence ordered down by Mr. Dixon has ever since been put up in any part, and that his orders were to the foreman and manager to put them down and leave them down at the places Mr. Dixon suggested, no matter if there were or had always been other gaps open that prevented its being an actual enclosure.

Should any complaint be made against me personally or against Mr. Steiwer seeking to indict either of us, please give us a show to be heard before action taken. We hope it is not the policy of the government to traduce those who complied with the general orders of the department to remove fences and to not enclose government land even though fences were on private land. All others who complied as promptly as we did—and no more so—with Mr. Dixon's orders were let alone by Mr. Hall. We can cite to several, and one of them a larger company than ours; but we will not be informers at this time as we believe they should now be let alone, after removing their fences, that were objectionable.

If Mr. Zachary the foreman of the defendant has in any instance disobeyed our orders and Mr. Dixon's wilfully, we would not shield him from punishment; but he claims to us he has not nor allowed it to be done, nor permitted those two or three gaps to be up after he discovered them.

We think as there is some question as to just what fences on our own lands should be opened, and this can best be settled in that civil suit, and we are willing to any reasonable decree being entered, and will be amenable to the Court for contempt for disobeying its decree, it would be hardly fair to indict us now. If you indict all who had fences either on government lands or on their own lands enclosing government land or both in Eastern Oregon a year and a half ago, you will indict half of the stock men in Eastern Oregon.

It is a pretty serious matter to indict men for an offense of this kind, as for many years it was supposed a man had a right to fence his own land no matter if it did enclose government land with his, or inside of his own, and I do not know as it is your intention to do so now, and as we are now willing to abide by all that the government can really ask of us in this civil suit, which is already quite a hardship, it would appear like a spirit of unfairness to further single us out; besides we have made gaps in all our fences and removed several of them, so that there is now nothing enclosed except it be a few isolated forties which have been applied for under the law to purchase isolated forties.

Yours sincerely,

H. H. HENDRICKS,
One of Attorneys for the Defendant.

I enclose you copy of letter to W. H. H. Wade mailed to him in the general delivery Portland.

H. H. H.

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FOSSIL, OREGON, Jan. 7, 1905.

W. H. H. Wade, Foreman Federal Grand Jury, Portland, Oregon.

DEAR SIR: I have been informed that Mr. Fred Ball of this neighborhood, being incensed at me for some imaginary cause, or for

being attorney for his wife in a divorce proceeding that she commenced charging him with laying up with another woman in Portland,—she having intercepted their correspondence—has gone to Portland for the avowed purpose of having me indicted, and for what I do not know. I know that I have not committed any crime. About a year and a half ago The Butte Creek land, Live Stock and Lumber Company of which I was Secretary and Treasurer, along with a great many other people in this rough country who were engaged in the stock business, was investigated for having government land enclosed. While this company had no fence on Government land except it be in getting outside the line of deeded land a few rods by accident, it had a small proportion of rough high rocky points that no one would pay taxes on, and these mainly isolated tracts enclosed. It was almost impossible to fence them out. But when special agent Dixon investigated and told Mr. Steiwer the President of that Company, or Mr. C. B. Zachary the foreman, where to take down any fence that he deemed objectionable, and the amount that he should take down to satisfy him fully, it was my understanding that the same was done; and thereafter there has been no government enclosure of any land by that company to my knowledge. There was one or two isolated tracts inside some cultivated fields that were applied for under the law to purchase isolated tracts, and it was my understanding that when these tracts were applied for in good faith that they were not then under the ban. I know that this company owns about 12,000 acres of land, all in a rough region, and it cannot fence more than a fourth of it; the rest lays out to the public. Our foreman has complained that in a few instances where he made gaps in the fences, they were put up without his knowledge, and he tore them out again two or three times. He did not know whether this was done to get us into trouble, or not, but he supposed it was that or that some neighbors did it to keep our stock back off of them, or to keep theirs from getting scattered too far. A civil suit is pending in the courts now there to enjoin that company from again fencing any land belonging to the government, and will surely not disobey whatever decree the Court makes in that matter. I have ever since Mr. Dixon was here instructed the foreman to never enclose a particle of government land again, or permit it to be done.

I own only a small interest in that company, and I am a comparatively poor man. I was born in this state, supported myself and worked my own way through the University at Eugene, and I am no criminal, and I would not have my name tarnished by an indictment for half the property of the whole State. My wife is in the Good Samaritan Hospital now, and I am here trying to take care of our five little children and keep them in school. However if complaint is made against me I would be glad to have an opportunity to be heard.

Yours truly,

H. H. HENDRICKS.

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Gov'T's Ex. 44.

PORTLAND, OREGON, *January 10, 1905.*

Mr. H. H. Hendricks, Fossil, Wheeler County, Oregon.

DEAR SIR: Your communication of the 8th inst., inclosing copy of your letter of the 7th instant to Mr. W. H. H. Wade, Foreman of the Federal Grand Jury, was received by me to-day.

I intend to ask the Grand Jury to investigate the matter of fencing the public lands by the Butte Creek Livestock, Land and Lumber Company, and in this connection it is not improbable that your name with that of W. W. Steiwer and Mr. C. B. Zachary, will be considered. If you desire to appear before the Grand Jury at your own request and in your own behalf in this matter, as suggested in your letter of the 7th instant to the Foreman of the Grand Jury, I will give you that opportunity, and the same privilege will be extended to Mr. Steiwer and Mr. Zachary. The matter will be taken up for consideration by the Grand Jury about the 14th instant.

Yours truly,

FRANCIS J. HENEY,
U. S. Attorney, District of Oregon.

70

Gov'T's Ex. 45.

FOSSIL, ORE., *Jan. 12, 1905.*

Hon. Francis J. Heney, U. S. District Attorney, Portland, Oregon.

DEAR SIR: I received your letter. It is now impossible for me to get away in person to go to Portland. My wife is at the hospital in Portland, recovering from an operation. I have five small children here, and the housekeeper I had with them was called away day before yesterday on a moment's notice on account of sickness in her own family in the country, and I have no responsible person to leave with my children, and one of the children is sick abed besides.

Now Mr. Heney I know personally nothing at all about the fences that appear to be now under investigation. There is no question about the fences on the summer range East of here having been opened promptly and kept open. As I understand it, the complaint is about fences on or about the winter range which lies West of Fossil. Those fences I have never seen. I never had any talk personally with Mr. Edward Dixon about the matter he had made his investigation. But I particularly commanded as one of the owners of the company Mr. C. B. Zachary, who had charge of them, to remove all that Mr. Dixon asked to be removed, and to keep them removed forever so long as by putting any up it made an enclosure of government land, and particularly to remove all fences that were on Government land in the vicinity of our lands or ranges. I have good authority to think that Fred Ball pointed

out old fences to Mr. Dixon and others that did not belong to our company; that we never built nor owned nor claimed nor fell heir to in any way. But it was my orders to have any and all that anyone might impute to us torn down if it was on government land, or might be construed as forming an enclosure. Mr. C. B. Zachary claims to have done this, and all the time claimed to me that he had done so in detail. He says that he has never had an actual inclosure anywhere since Mr. Dixon was here. I asked him to go to Portland and explain to you and the Grand Jury exactly the situation. And I suppose he will start in the morning. I am sorry that I cannot come, but as I say, I do not know personally anything, as these fences are in a rough country from ten to twenty miles from here, and I have never been up and down the creek even, but once, and that was five years ago, and I saw no fences then except the fields on the creek bottoms along in a few places were fenced.

I am willing to make as fair a decree in the injunction proceedings as any fair-minded man, as I judge you are, will ask, and for that purpose, or the purpose of conferring about that, I will come to Portland as soon as I can, as soon anyway as my wife can get here to take care of the children.

71 Mr. Zachary who will be there to see you, owned a great deal of that land down there before he put it in the company, and was running cattle there several years before, and had also brought out his brother, and another cattle man. Mr. A. G. Ogilvie was a sheep man, and he acquired a lot of land down there next above Zachary, and he had bought out the Stewarts, large horse ranches, in those rough hills, and Zachary and Ogilvie were bucking each other hard—one a cattle man and the other a sheep man. I was attorney for both of them and had their confidence, and it was at my suggestion that they combined their interests in the form of a corporation, and quit their wrangling. The fences, except what has been torn down since are just as they had them, with the exception of one string built for a drift fence, and which was opened for a good long distance and kept open at the suggestion of Mr. Dixon. Everyone has told me, and the Bills boys have time and again told me this drift fence did not form an enclosure, as it connected with the rim rock, and that was not continuous, and these disconnected gaps were never fenced; and whole bands of sheep passed easily along these gaps, (that is through them), and other stock passed at will. That was the so-called large enclosure, that I never intended to be one in fact, and it never was one in fact; and all persons who had any land in or about it used it the same as we did. Oliver Bills can tell you that those large gaps in the rim rocks on Iron Mountain were never fenced at any time. So can Loren Combs. They have both told me so several times. So has Coe Barnard. Next to Mr. Zachary, Mr. Barnard is the most familiar with that whole country and range, as his stock have run there at will for the last ten or fifteen years, and run there yet and he rides after his almost or quite fully as much as Mr. Zachary rides after ours. I would like to have you sup-

pena him to testify. He may not know the lines as well as Mr. Zachary but he certainly knows the fences and rim rocks and passes as well as anyone else.

Yours sincerely,

H. H. HENDRICKS.

Gov't's Exhibit 45-a.

Envelope addressed "Hon. Francis J. Heney, U. S. Dist. Att'y, Portland, Ore."

72

Gov't's Ex. 46.

FOSSIL, OR., Jan. 31, 1905.

Mr. Francis J. Heney, U. S. District Attorney, Portland, Or.

DEAR SIR: I write to you with reference to the threat I am informed you made to have me indicted for subornation of perjury in reference to a letter it is claimed I wrote to Irve Wilks.

He wrote to me asking me for the dates of their filings and proofs and the dates of the deeds, and what my recollection of the testimony was that was taken before me in the final proofs.

I answered this inquiry in good faith, believing that the testimony that was taken before me was true as taken. I had never seen anything to indicate any other state of facts, and I had no personal knowledge of any other state of facts.

Interpreted with this in mind, and without prejudice, my letter was innocent of any intention or suggestion that these parties should give false testimony before the grand jury. If they had ever talked of selling their land to Mr. Zachary I had no knowledge of it. I had never been on their claims and have not since been on either of them. Had I not a right to assume and believe that the sworn testimony of the parties as given before me in taking the testimony was true, when I knew of no fact to the contrary? If I misstated what the testimony before me was or what my understanding of their dealings was, it was not my intention, but the fault of memory. I positively had no knowledge of any agreement to sell the land to Mr. Zachary, if these parties now claim there was such an agreement; and I positively had no knowledge of any other fact or testimony being false, if it was false. And surely all the parties

73 and witnesses swore that there was no such agreement before me, when making proof. If they lied about their residence I knew nothing about that either, and I do not know yet; and I surely did not when I wrote to Wilks what the testimony before me was as to my recollection of it. I understood then that all those things were true. I did not suggest that they state to the grand jury that no agreement was made to sell that land unless it was a fact, although I reminded him that that was what they swore to before me when they made proof.

Now you may get me indicted, but you cannot convict me on that charge, for I am innocent of any knowledge that their testimony before me was false. Why, I even knew of Emma Wilks and her

husband leaving town to go and live on her place, and I always supposed they went there to live, and don't know any different yet. That she had a cabin I do not doubt, because a neighbor wanted to buy it of me after we bought the land sometime. He seemed to know what it was and where it was. If everything was not all right with the Wilks proofs and legal in every way I was misled.

I wish you would read this letter to the Grand Jury.

Yours sincerely,

H. H. HENDRICKS.

Government's Exhibit 46-a.

Envelope addressed Francis J. Heney, U. S. District Att'y, Portland, Ore.

74 And identified them as letters received from Mr. Hendricks and his answers thereto and that they were received about the time that the Grand Jury was in session and testified as follows:

Q. At the time you were such officer were you conducting investigations concerning the Butte Creek Land & Live Stock Co., before the Grand Jury, certain members of which testified in this case?

A. I was, and also against the members of the company.

Q. At and before—before the witness Hawk appeared before the Grand Jury, will you state to us what the body had under investigation with respect to the operation of the Butte Creek Land Live-stock and Lumber Co., if it had anything under investigation?

A. At the time I wrote that letter, January 10th, the only matter I had under consideration was the unlawful fencing of public lands in relation to this large pasture, but as soon as the witnesses arrived here from the information I received from the witnesses who were subpoenaed and who were all subpoenaed at once, I took up the matter of the investigation of the unlawful acquiring of public lands, and particularly the unlawful acquiring of public lands by one John Roll.

Q. Now, with respect to this Roll matter, state if you recall any action that may have been taken by that body at the time they were conducting this same investigation with respect to the Roll transaction?

A. Yes, sir. The investigation was to determine whether or not Roll had taken up this land within a time of the time of the Statute of Limitations at the instigation of Hendricks or Cant Zachary, and the Grand Jury voted an indictment against both of them

75 in that matter—to defraud the government out of that portion of the public lands.

— The WITNESS: The indictment was not returned.

Q. Why not?

A. Because I didn't get time to prepare it, I suppose.

Q. As a fact, however, during the course of the investigation there were other indictments returned than the one we are trying this case upon, concerning the transactions of the Butte Creek Land, Livestock & Lumber Co.?

A. Concerning Mr. Hendricks and Cant Zachary there were.

Q. And the reason that the indictment never took life as an instrument in court was because you had no time to draw it?

A. Yes, there was a number of indictments drawn which involved Mr. Steiwer, the president of the company and Mr. Zachary and Mr. Hendricks but this one I omitted to draw after having been requested to by the Grand Jury to draw it, and having been advised of their vote on it. I neglected to draw it, because of the pressure of other business, of drawing other indictments.

Q. Can you tell, what is your best recollection as to how far eastwardly, so far as the location in the country is concerned, your investigations extended in the matter of the taking of public lands which you mentioned?

A. Well, it took in practically the whole of Wheeler County.

Q. Clear to the east boundary line of Wheeler County, didn't it?

A. Yes, sir.

76 Q. And those matters—isn't it a fact those matters were suggested as the investigation of the officers as to the original matter on which they started progressed?

A. Yes, sir, and before any witnesses testified. Hawk testified on January 23d, he appeared here on the 19th—before Hawk was sworn—Hawk appeared here the same time Roll did, and they were put before the Grand Jury on the 23rd, and the matter under investigation was the Roll matter, the unlawful acquiring of public lands in the Roll matter.

Q. Can you recollect from any paper you have seen lately the number of witnesses that came before you and investigating body in connection with this Butte Creek Land Live Stock and Lumber Co., matter?

A. I have not counted them, but we had in the neighborhood of twenty, I guess, and the Hawk testimony was taken in there after it appeared to be beyond the Statute of Limitations; the testimony was taken for the purpose of gaining knowledge in regard to system and knowledge on the part of Hendricks.

Q. With reference to the operations which you were daily finding disclosed?

A. With reference to the John Roll case which was in 1904 and was in the statute of limitations.

Q. Roll was subpoenaed when?

A. Roll was subpoenaed on the same day and under the same subpoena Hawk was subpoenaed, and Clyde Brown; they were all on the same subpoena; I have the original here.

Q. You find Hawk's and Roll's name upon the original subpoena?

A. Ed Smith, Nath. Brown, Roll, T. W. Grant, Sophia Kyllonen.

Q. Sophia Kyllonen, is that the same person who was on the stand here and was a witness the other day?

77 A. Yes, sir, that is the old lady who ran a boarding house.

L. H. Myers, Glass and Irvin Wilks.

Q. The same Irvin Wilks who was on the stand here the other day?

A. The same one.

Q. You spoke of Sophia Kyllonen as the boarding house woman. Is she the boarding house woman or the washerwoman?

A. The washerwoman; Mrs. Hamilton is the boarding house woman.

Q. Now, then, was it after those investigations had progressed somewhat and before the actual indictment had been returned that you received Government's Exhibit 46?

A. The indictment as I recollect it was turned in on February 1st, as the record will show. I think I got this letter the same day.

Q. The indictment bears date of filing the 8th day of Feb., 1905.

A. Then I got this before that went in, the indictment had already been voted. I have the record here of the Grand Jury on the vote for the indictment.

(Mr. Bristol then read Government's Exhibit 46).

Q. While I think of it, the fact was then that there were other things than fencing being investigated?

A. Oh, yes.

Q. What is the fact with reference to the statement of the defendant as to whether Zachary appeared before the Grand Jury with reference to those matters?

A. He did.

78 There was no other testimony offered or introduced at said time concerning the subject or what matters were being investigated by the Grand Jury at the time of the alleged perjury and no other or further testimony tending to show the materiality of the statements charged in the indictment to have been falsely sworn to before the Grand Jury by the witness Hawk or any of them.

And thereafter, and on the conclusion of the Government's case the defendant by his attorney duly moved the court to withdraw said case from the jury and to dismiss and nonsuit the same upon the ground that there was no sufficient evidence of the materiality of the statements charged in the indictment to have been falsely made and no sufficient evidence of the materiality of said alleged false statements, but the motion was denied and to the ruling of the court denying and refusing to allow the same the defendant excepted and his exception was allowed.

And thereafter, and at the proper time before the jury had retired the defendant placed in writing and asked the court to give the following instruction.

"(No. 8) Before you could find the defendant guilty on this charge, it must be proven that the alleged false testimony was material to some investigation before the Grand Jury, and there is no evidence that it was so material, and you should acquit."

But said instruction was refused by the court to which refusal the defendant excepted and his exception was allowed. Thereupon the defendant further requested the Court to charge the jury as follows,

"(No. 9) In this case I charge you that you should bring in a verdict of acquittal for lack of sufficient evidence."

79 But this instruction was refused by the Court, to which refusal the defendant excepted and his exception was allowed, and thereafter in the course of its general charge the court charged the jury upon this subject as follows,

"It was proper for the Grand Jury to investigate into the acquisition of the homestead claim of the witness Hawk" and if they did so and investigated the acquisition of the public land by Hawk and others the matter was material to the inquiry before them" to which the defendant objected and excepted as not being the law and not sustained by the evidence in the case, and upon the grounds that there was no evidence that any such testimony became material to the investigation before the Grand Jury.

And the Court (continuing) further charged the jury in the same connection.

"And it was proper for them as a Grand Jury to ascertain whether or not Hawk made his entry honestly and in good faith for the purpose of actual settlement and cultivation and not for the benefit of any other person or corporation and whether or not he was acting as the agent of any person or corporation in making the entry or was in collusion with any person or corporation to give them the benefit of the land so entered and whether he was not applying to enter the land for the purpose of speculation but in good faith and to obtain a home for himself and whether or not he had made or would make any agreement or contract with any person or corporation by which the title he might acquire from the United States would inure to the benefit of any person except himself and whether he had paid the fees himself required by law to be paid upon the filing and whether or not in making his final proof he had in April,

80 1899 commenced his residence upon the land and had not sold or conveyed or mortgaged any portion thereof."

And thereafter and it appearing from the undisputed testimony of the Government that the filing of said Hawk was made on the 21st day of October, 1898 and that his final proof was made on the 2d day of March, 1900, the defendant requested the Court to charge the Jury as follows:

"If there was any crime committed by Hawk, or the defendant, in the matter of filing on his claim, or making final proof upon the same as shown by the evidence, it was outlawed, and could not be prosecuted at the time defendant is charged with having committed this crime."

But the Court refused said charge to which refusal the defendant then and there excepted, and his exception was then and there allowed.

Be it further remembered, that A. BETTINGER having been called as a witness for the Government and having testified as follows:

Q. Mr. Bettinger, were you acting as a member of a Grand Jury in this Court, at the time an indictment was brought against the defendant H. H. Hendricks?

A. I was.

Q. Do you remember two witnesses appearing before that Grand

Jury, by the name of George W. Hawk and Clyde Brown, respectively?

A. I do, I remember Mr. Hawk more particularly.

Q. What did Mr. Hawk testify to, in regard to taking up a homestead, if you remember. Can you give the substance of what he testified to?

A. Well, what he testified to was, he had taken up a homestead for his own use, and he said he used his own money, that was his first statement.

81 Q. For final proof?

A. For final proof, yes, sir."

was asked the following question:

Q. Did he make any other statement afterwards?

To which the defendant objected on the grounds that statement was post-dating the alleged perjury and self serving in its character and incompetent as against the defendant in this case and not binding in any way upon the defendant, but the Court overruled the objection and held the testimony competent, to which holding and ruling the defendant excepted and his exception was allowed.

Whereupon the witness answered the question as follows:

A. He made another statement afterwards. The sweat commenced to pour down his cheek and he made a statement again afterwards—well, after the first statement, then he said I am will-in—he walked the floor—he made a few steps and said 'well, I will tell the Grand Jurymen the truth,' he says, and he said "I was taking this land up for somebody else." He said he was taking the land up for somebody else and he said first he was taking it all up for himself, and when he told the truth he said it was for somebody else.

Q. Before he told the truth did he say whether or not he had made any contract to sell the land before making final proof? Did he claim he was making final proof on the land for himself or had made an agreement to sell it?

Same objection, ruling and exception.

A. I am not sure about that, but it seems to me that he had a contract as I remember right; he had a contract that the land was going over to another party.

Q. Do you remember whom he said he had agreed to sell it to?

82 Same ruling, objection and exception.

A. It seems to me like Hendricks.

And be it further remembered, that while said Bettinger was on said stand and being examined on behalf of the Government and having testified as follows,

Q. Now, after the witness Brown, do you remember as to how he testified, as to whether he had filed on a homestead or not?

A. I don't remember Brown saying much, only by reading over the testimony, and jogging my memory, that is about all I remember, but this man Hawk, as quick as I saw him, I remembered all about his.

Q. How long ago was this that the Grand Jury was in session?

A. About a year and a half ago.

Q. At the time the indictment was presented, before it was returned, did you hear the indictment, or hear it read in the Grand Jury room?

A. Yes, sir, I think I heard it read; I am not sure whether I read the indictment at that time, or that indictment; I read some of them; I could not be sure about that.

Q. Do you remember Brown being there before the Grand Jury; do you recall him?

A. No, I can't recall him; Not by his looks. Hawk was the man I remember; I remember him very plainly.

Q. Did you vote on the question of indicting Mr. Hendricks for subornation of perjury?

A. I did.

Q. At the time you voted were the facts fresh in your mind?

A. They were surely fresh in my mind at that time.

Q. Was the assistant U. S. Attorney, do you remember who it was appeared before the Grand Jury as Assistant U. S. Attorney?

83 A. Mr. Heney.

Q. Myself?

A. Yes, sir.

Q. Was there any instructions given me in your presence, in regard to drawing the indictment?

A. Not that I remember of.

Q. Was there any vote taken on the question of indicting Mr. Hendricks, did you vote on the question of indicting him for subornation of perjury?

A. Yes, sir. We did vote; we voted; and we called you in and told you.

Q. You told me how you had voted?

A. Yes, sir, we told you how we had voted.

Q. Do you remember how many votes there were for the indictment?

A. No, sir, I could not tell you.

Q. Look over that indictment and say whether or not—at the time the request was made for an indictment or that I was notified that an indictment had been voted, were the facts fresh in your memory?

A. Yes, sir.

Q. Do you remember as to how many persons he was accused of suborning to commit perjury?

A. No, I don't remember exactly; it must have been five or six.

Q. Do you remember how many were put into the indictment?

A. No, I don't remember just how many.

Q. Do you remember Mr. Hawk was one of them?

A. Yes, sir, I remember Mr. Hawk was one of them.

To which there was the same objection, ruling and exception.

A. Well, I can't give—I cannot remember the words that he used, but it was that he had taken it up for some other purpose; he had been induced or influenced by other parties to take up the land,

And thereupon the witness was asked the following question:

Q. Do you know who the parties were who he said he was taking it up for?

Same ruling to objection, and exception allowed.

A. I do not. I cannot; I do not bear in mind just now, that is, who the parties were—whether it was for—

And thereupon the following question was asked:

Q. Do you remember who he said the land was to go to?

To which there was the same objection, ruling and exception.

Thereupon the witness answered:

A. Oh, I don't just call to mind at present just what statement he made to that.

Thereupon the witness was asked the following question:

Q. Do you recollect any parties it was to go to?

To which there was the same objection, ruling and exception.

88 To which the witness answered,

A. To this company.

Thereupon the witness was asked,

Q. Which company?

To which there was the same objection, ruling and exception.

Thereupon the witness answered,

A. Why, the Butte Creek Company; but, I say, I could not remember who it was—who had made—who it was—the different ones—whether he named any different individuals or not; I don't know about that.

Thereupon the following question was asked,

Q. Were the names of certain individuals connected with that company brought into the investigation?

To which there was the same objection, ruling and exception.

And thereupon the witness testified,

A. Yes, sir.

Q. In regard to the company acquiring land, and in regard to the fencing of land?

Same objection, ruling and exception.

A. Yes, sir.

Thereupon the following question was asked,

Q. What names were they?

Same objection, ruling and exception.

Q. Who were they?

A. Hendricks, Steiwer and Zachary.

Thereafter one, JOHN W. JORY was called as a witness who having testified that he was a member of the Grand Jury and participated in the proceedings therein, that he had some memory as to what the witness Hawk testified, but nothing very definite, was asked the following question,

89 Q. Do you have any definite knowledge as to whether he changed his story while in there?

To which the defendant objected as incompetent, immaterial and in no way binding upon the defendant and hearsay.

But the objection was overruled and the defendant excepted and his exception was allowed.

Thereupon the witness answered,

A. Yes, sir, I did.

Whereupon the witness was asked the following question,

Q. What did he do at that time immediately preceding his change if anything, that you recollect?

A. Well, as I recollect it now, he, in the first place, denied that he had ever received any aid from other persons in paying for the place, that is paying the filing fees, etc., it seems he lied. It is dim to me just exactly what it was, but when he changed later, he acknowledged that he had been induced to take up this place for the benefit of other parties.

Whereupon the defendant by his attorney moved to strike out that part of the answer wherein the witness stated, "later he acknowledged that he had been induced to take up this place for the benefit of other parties," as not responsive to the question, incompetent, immaterial, and in no way binding upon the defendant and hearsay.

But the motion was overruled and the defendant excepted to the ruling of the court and his exception was allowed.

And thereupon over the same objection, ruling and exception the witness was permitted to testify that Hawk testifies, as he remembered it, that the money for the filing fees was advanced by the Company and not by himself, and that at the time he made the filing, he was to get the money—that is he was to file for the Company and they would bear all the expenses.

90 And thereafter one F. G. BUFFUM was called as a witness for the Government and testified that he was a member of the Grand Jury and remembered Mr. Hawk being called as witness, but that when he was called in he appeared to be very nervous and his first story was that he had made the purchase of the land for his own benefit—that after being questioned a long time he got up out of his chair and straightened himself up and mopped his

face with a handkerchief a few times and stuck to his story for some time, that he was continually asked questions by Mr. Heney and finally he changed his story after some hesitation, and said, "I have been telling you a lie. I will come out and tell the truth and take the consequences." I think those are very nearly the words he used.

Whereupon the witness was asked the following question,

Q. Now, do you recollect what he said afterwards as to taking up the homestead, after he had commenced—after he had made this statement that he was going to tell the truth?

To which the defendant objected on the ground that it was incompetent, immaterial, in no way binding upon the defendant and hearsay.

But the objection was overruled and the defendant excepted and his exception was allowed.

Whereupon the witness answered,

A. He said he was approached up there in regard to taking a homestead, that he filed on it, and that all the expenses were paid by the Butte Creek Company, and I forget the amount of money he was to receive but I think it was \$300 when the final proof was issued.

And be it further remembered, that one JOHN W. MORGAN was called on behalf of the Government as part of its direct case and after testifying that he lived at Fossil, Oregon, that he had
91 lived there off and on for about 20 years, that he was a laborer and painter—that he made more money shuffling cards than at anything else, that in 1903 he made a homestead filing, that he made a homestead affidavit before Mr. Hendricks as Commissioner, that he did not know whether he was sworn to the paper or not, that the signature to the non-mineral affidavit was his but that he did not remember whether he was sworn to it or not.

Whereupon the homestead affidavit, dated June 13, 1903 and the non-mineral affidavit were offered in evidence.

To the introduction of these papers the defendant objected as incompetent, immaterial, and not tending to support the allegation in the indictment, and to have been filed long after the Hawk filing and final proof, and therefore not possibly admissible as part of any system.

But the Court overruled the objection and admitted the papers in evidence.

To which ruling and admission the defendant then and there excepted and his exception was allowed.

And thereupon said papers were read in evidence and were as follows,

GOVERNMENT'S EX. 31.

Homestead Affidavit.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
THE DALLES, OREGON, *June 13, 1903.*

I, John M. Morgan, of Fossil, Oregon, having filed my application No. 12762, for an entry under Section 2289 Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I am a native born male citizen of the U. S., aged 25 years; that this affidavit and filing is made before H. H. Hendricks, U. S. Com. at Fossil, in Wheeler County, Oregon, for the reason that he is the nearest and most accessible person qualified to take filings to said land; that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person, persons or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and

93 will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself, and further, that since August 30, 1890, I have not entered under the land laws of the United States, or filed upon, a quantity of land, agricultural in character, and not mineral, which with the tracts now applied for, would make more than three hundred and twenty acres; that great distance prevents me from going to The Dalles, Oregon, to file, and that I have not heretofore made any entry under the homestead laws, except the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of Sec. 1, Tp. 6 S., R. 19 E., which I filed on and abandoned before Jan. 5, 1900.

(Sign plainly with full Christian name.)

(Signed)

JOHN M. MORGAN.

Sworn to and subscribed before me this 13th day of June, 1903, at my office at Fossil, in Wheeler County, Oregon.

(Signed)

H. H. HENDRICKS,
U. S. Com. for Oregon.

Here insert statement that affiant is a citizen of the United States or that he has filed his declaration of intention to become such and that he is the head of a family, or is over twenty-one years of age, as the case may be. It should be stated whether applicant is native born or not, and if not, a certified copy of his certificate of naturalization, or declaration of intention, as the case may be, must be furnished.

(See Page 45, circular of Jan. 1st, 1899.)

GOVERNMENT'S EXHIBIT 32.

Non-Mineral Affidavit.

This affidavit can be sworn to only on personal knowledge, and cannot be made on information and belief.

The Non-Mineral affidavit accompanying an entry of public land must be made by the party making the entry, and only before the officer taking the other affidavits required of the entryman.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
THE DALLES, OREGON, June 13, 1903.

John M. Morgan, being duly sworn according to law, deposes and says that he is the identical person who is an applicant for Government title to the Lot No. 4, Sec. 30, and Lots 1, 2 and 3 of Sec. 31, in Tp. 5 S. R. 20 E.; that he is well acquainted with the character of said described land and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel or other valuable mineral deposit; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no

95 portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to the mineral land, but with the object of securing said land for agricultural purposes, and that his post-office address is Fossil, Oregon.

(Signed)

JOHN M. MORGAN.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified

before me by ———), and that I verily believe him to be a credible person, and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Fossil, Oregon, within The Dalles, Oregon, land district, on this 13th day of June, 1903.

(Signed)

H. H. HENDRICKS,
U. S. Com. for Oregon.

NOTE.—The officer before whom the deposition is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law.

Revised Statutes of the United States, Title LXX—Crimes—
Chap. 4.

SEC. 5392. Every person, who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any
96 written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath, states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter, be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

97 Whereupon the following question was asked the witness:

Q. Prior to making this homestead filing which has been shown to you, of June 13, 1903, had you ever made any other homestead filing?

To which the defendant objected as immaterial and incompetent. Whereupon the Court asked:

The COURT: Why do you ask him that, Mr. Heney? What is the purpose? To which, Mr. Heney answered: He objects to this (the former papers) as being too late. Now we will show one back of that, which wasn't too late. We propose to show system, and we offer this for the purpose of showing system and knowledge.

The COURT: Was this one offered. The homestead?

Mr. HENNEY: Yes, sir.

The COURT: Now you ask him if he ever made another one.

Mr. HENNEY: A prior one.

The COURT: He could only make one under the law.

Mr. HENNEY: We are going to show a prior one was made at the request of Mr. Zachary, and that this was also made.

Whereupon the objection was overruled, and the defendant by

his counsel then and there in open court excepted and his exception was allowed.

Whereupon the witness answered:

A. Yes, sir.

Thereupon subject to the same objection, ruling and exception the witness testified:

Q. When was that, do you remember?

A. It was a long time ago; I don't remember.

Q. Now, then, before whom did you make the other one?

A. Mr. Hendricks.

98 Q. And did you have any talk with any one before you made it?

A. Yes, sir.

Q. With whom?

A. With Mr. Zachary.

Q. And what was that talk?

To which the defendant then and there objected upon the ground that it does not appear that at the time this talk was had with Mr. Zachary, that he was not in any position to bind Mr. Hendricks in any way and it does not appear that he was even a member of the Company of which Mr. Hendricks was a member.

But the objection was overruled.

To which ruling of the Court the defendant by his counsel then and there duly excepted and his exception was then and there allowed.

Whereupon the witness in answer to a question by Mr. Hendricks testified that he didn't remember just when it was, but that he was 21 years old when he filed and that he was at the time he was testifying 28 years old.

Whereupon the following question was asked:

Q. Now then, at the time you made the filing or before you made that filing, what talk did you have with Mr. Zachary about it?

To which the defendant objected upon the ground that it was not made to appear that Mr. Zachary was in a position at that time to bind any member of the company, that he does not appear to be a member of the Company of which Mr. Hendricks was.

And thereupon at the request of the defendant, he (the defendant) was permitted to examine the witness and the following questions and answers were had:

99 Q. Mr. Morgan, do you remember when Mr. Zachary and Mr. Ogilvie sold out to the Butte Creek Land, Live Stock and Lumber Company?

A. I remember there was a sale; that is all.

Q. You remember of the sale; it was before that, before you filed, wasn't it?

A. I don't know.

Q. What say?

A. I can't say whether it was before or after.

Q. At that time, Mr. Zachary was running business for himself, wasn't he? Individually at the time you filed the first time?

A. Well, I did not know anything about their business, so I could not say.

Whereupon the objection was overruled and the defendant excepted and his exception was allowed and the witness answered:

A. Why, he asked me to take up a homestead and asked me if I wanted to take up a claim and I told him I would, and I went and filed on a claim, that is all.

Whereupon the witness was asked the following question by Mr. Heney:

— Was that all?

To which there was the same objection, ruling and exception. And thereupon the witness answered:

A. Well, I was to receive \$300 for the claim.

Whereupon the following question was asked on behalf of the Government:

Q. Did he tell you that?

To which there was the same objection, ruling and exception.

And the witness answered, Yes, sir.

Thereupon subject to the same objection, ruling and exception, the witness testified as follows:

100 Q. Did he give you any money then?

A. Not then. No.

Q. Did he at any time after?

A. No; Zachary never gave me any money.

Q. Did anybody give you any money?

A. Yes, sir.

Q. Who?

A. Well, I got it out of Steiwer's and Carpenter's store; Mr. Carpenter handed me \$200.

Q. How long after you filed?

A. Oh, I don't know; it was a few months, I guess, a month or two, I don't know, it might have been more.

* * * Q. Now what became of that first homestead claim?

A. I relinquished it.

Q. Where was that located?

A. I don't know; I never saw it.

Q. You never saw it?

A. No.

Q. Did Mr. Zachary tell you where it was at the time you filed?

A. I don't thing so.

Q. Did he tell you whether it was anywhere near any land he had anything to do with?

A. He didn't say.

Q. Well, do you know where the big pasture of the Butte Creek Land Company is, up there?

A. I know where some of it is.

Q. Did he say anything about any of it being somewhere near there?

A. I don't think he said where it was at all.

101 Q. Now then, at the time you filed the second homestead filing, did you have any talk with anybody before you made the filing?

A. Yes, sir. I had a talk with Mr. Zachary.

Q. With Mr. Zachary?

A. Yes, sir.

Q. Cant Zachary?

A. Yes, sir.

Q. What did he say to you about that?

A. Of course——

And thereupon the witness was asked the question:

Q. What did he say?

To which the defendant objected as incompetent, immaterial, hearsay and not in any way binding upon the defendant.

But the objection was overruled and the witness answered:

A. He asked me if I wanted to take up a—he wanted to know if I wanted to take up a homestead for him and I asked him what I was going to get for it, and he told me what I would get when I had taken up the claim.

Whereupon, subject to the same objection, ruling and exception, the witness testified as follows:

Q. What did he tell you he would do?

A. He told me he would give me \$150 worth of lumber, and when I had proved up on the claim he would give me \$150 in addition to that.

Q. And what were you to do with the lumber?

A. Well, I was to build a house with the lumber.

Q. Where?

A. In Fossil.

Q. In Fossil?

A. Close to Fossil.

102 Q. The house wasn't to go on this homestead?

A. Well, I guess not. I lived in it in Fossil.

Q. Did he give you the lumber?

A. I got the lumber at the mill.

Q. Was it furnished to you?

A. Yes, sir.

Q. Did you pay for it?

A. I paid for some of it; I didn't pay for \$150 worth.

Q. Well, you paid for a portion, but there was a difference of \$150, that you didn't pay for?

A. Yes, sir.

Q. And that went into the house you were building?

A. Yes, sir.

Q. Did you make final proof on this land?

A. I commuted it.

Q. You commuted it?

A. Yes, sir.

Q. Who furnished money for commuting?

A. I don't know; I never saw the money.

Q. You didn't furnish it yourself?

A. No, sir.

Q. And after you got the land, after you got your final receipt, and made your final proof, did you deed the land to any one?

A. No, sir.

And thereafter the witness was shown what purported to be the final proof upon his homestead claim taken before James Stewart, as Commissioner on the 19th of September, 1904, and having identified his signature to the paper and testified that he made the proof before James Stewart, U. S. Commissioner, the aforesaid proof was offered in evidence by the Government and was as follows:

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4-369.

GOVERNMENT'S EX. 33.

Homestead Proof—Testimony of Claimant.

JOHN M. MORGAN, being called as a witness in his own behalf in support of homestead entry No. 12,762, for Lot 4, Sec. 30, Lots 1, 2 and 3, Sec. 31, Tp. 5 S., R. 20 E., W. M., testifies as follows:

Ques. 1. What is your name, age, and postoffice address?

Ans. John M. Morgan, age 26, Fossil Oregon.

Ques. 2. Are you a native born citizen of the United States, and if so, in what State or Territory were you born?

Ans. Yes; Illinois.

Ques. 3. Are you the identical person who made homestead entry, No. 12,762, at The Dalles, Oregon, land office on the — day of — 1903, and what is the true description of the land now claimed by you?

Ans. Lot 4, Sec. 30, Lots 1, 2 and 3, Sec. 31, Tp. 5 S., R. 20 E., W. M.

Ques. 4. When was your home built on the land, and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. November, 1902; established residence in house at same time. 12x14 box house, shingle roof, one door and one window, good floor, stove pipe through tin in roof, all fenced with 2 wires, good spring water, 35 acres plowed, total value of improvements \$350.00.

Ques. 5. Of whom does your family consist; and have you and

your family resided continually on the land since first establishing residence thereon? (If unmarried state the fact).

Ans. Myself and wife; yes.

Ques. 6. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent did your family reside upon and cultivate the land during your absence?

Ans. None.

Ques. 7. How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

Ans. 35 acres cultivated; raised two barley crops, last year and this. Pastured my stock on place—2 horses and 2 cows.

Ques. 8. Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business?

A. No.

Ques. 9. What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality and for what purpose it is most valuable.

Ans. Grazing and farming, mostly grazing.

Ques. 10. Are there any indications of coal, salines, or minerals, of any kind, on the land? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11. Have you ever made any other homestead entry? (If so, describe the same).

Ans. No.

Ques. 12. Have you sold, conveyed, or mortgaged any portion of the land; and if so, to whom and for what purpose?

Ans. No.

Ques. 13. Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same, and state where the same is kept.)

Ans. No.

Ques. 14. Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing (not mineral) made by you since August 30, 1890.

Ans. Homestead entry, N $\frac{1}{2}$ SW $\frac{1}{4}$; N $\frac{1}{2}$ SE $\frac{1}{4}$; Sec. 1, Tp. 6 S. R. 19 E., W. M., which I abandoned soon after filing and relinquished in Spring of 1900.

(Sign plainly with full Christian name).

(Signed)

JOHN M. MORGAN.

(In case the party is of foreign birth, a certified transcript from the court records of his declaration of intention to become a citizen, or of his naturalization, or a copy thereof, certified, by the officer taking this proof, must be filed with the case. Evidence of naturalization is only required in final (five year) homestead cases.)

I hereby certify that the foregoing testimony was read to the claimant before being subscribed and was sworn to before me this 19th day of September, 1904, at my office at Fossil, Wheeler County, Oregon.

(Signed)

JAS. S. STEWART,
U. S. Com. for Oregon.

(See note below).

NOTE.—The officer before whom the testimony is taken should call attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law.

Title LXX—Crimes—Chapter 4.

SEC. 5392. Every person, who, having taken an oath before a competent tribunal, officer or person, in any case in which the law of the United States authorized an oath to be administered 106 that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate, by him subscribed is true, wilfully and contrary to such oath, states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States, until such time as the judgment against him is reversed. (See Sec. 1750.)

Final Affidavit Required of Homestead Claimant's Blank.

(4-369.)

Homestead Proof—Testimony of Witness.

ROBERT V. ZACHARY, being called as witness in support of the Homestead entry of John M. Morgan for Lot 4, Sec. 30, Lots 1, 2 and 3, Sec. 31, Tp. 5 S. R. 20 E., W. M., testifies as follows:

Ques. 1. What is your name, age and postoffice address?

Ans. R. V. Zachary, age 53, Fossil, Oregon.

Ques. 2. Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. Yes.

Ques. 3. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No.

Ques. 4. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land?

107 Ans. Grazing and farming; mostly grazing land.

Ques. 5. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans. In the fall of 1902, established residence at that time. I live six miles from settler, my stock ranges round his place. He is one of my nearest neighbors.

Ques. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. Yes.

Ques. 7. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. None.

Ques. 8. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans. 35 acres, raised two grain crops—1903 and 1904.

Ques. 9. What improvements are on the land, and what is their value?

Ans. Good lumber house, 12x14 feet, shingle roof, one door and a window, good floor, stove-pipe goes through tin in roof; all fenced with 2 wires, good spring water, total value of improvements about \$300.00.

Ques. 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11. Has the claimant mortgaged, sold or contracted to sell any portion of said homestead?

Ans. Not that I know of.

Ques. 12. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. Yes.

(Sign plainly with full Christian name.)

(Signed)

ROBERT V. ZACHARY.

I hereby certify that the foregoing testimony was read to the witness before being subscribed, and was sworn to before me this 19th day of September, 1904, at my office at Fossil, in Wheeler County, Oregon.

(See note on fourth page.)

(Signed)

JAS. S. STEWART,

U. S. Com. for Oregon.

(The testimony of witnesses must be taken at the same time and place, and before the same officer, as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, description of land, or otherwise.)

Homestead Proof—Testimony of Witness.

COE D. BARNARD, being called as witness in support of the Homestead entry of John M. Morgan, for Lot 4, Sec. 30, Lots 1, 2 and 3, Sec. 31, Tp. 5 S., R. 20 E., W. M., testifies as follows:

Ques. 1. What is your name, age and postoffice address?

Ans. Coe D. Barnard, age 31, Fossil, Oregon.

Ques. 2. Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. Yes.

Ques. 3. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No.

Ques. 4. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land.

Ans. Grazing and farming.

Ques. 5. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans. About November, 1902; established residence in house at that time. I live about eight miles from settler, and my livestock ranges around his place, which I frequently have occasion to pass.

Ques. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. Yes.

Ques. 7. For what period or periods has the settler been absent from the land since making settlement, and for what purposes; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence.

Ans. None.

Ques. 8. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

110 Ans. About 35 acres, two seasons—grain, 1903 and 1904.

Ques. 9. What improvements are on the land, and what is their value?

Ans. Lumber house, 12 x 14 feet, shingle roof, one door and one window, good floor, all fenced with 2 wires fence, stove pipe goes through tin in roof of house, good spring water, total value of improvements \$300.00.

Ques. 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes?)

Ans. No.

Ques. 11. Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans. Not that I know of.

Ques. 12. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. Yes.

(Sign plainly with full Christian name.)

(Signed)

COE D. BARNARD.

I hereby certify that the foregoing testimony was read to the witness before being subscribed, and was sworn to before me this 19th day of September, 1904, at my office at Fossil, in Wheeler County, Oregon.

(Signed)

JAS. S. STEWART,
U. S. Com. for Oregon.

(See note on fourth page.)

(The testimony of witnesses must be taken at the same time and place, and before the same officer, as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, description of land, or otherwise.)

111 To which the defendant then and there objected as being immaterial and incompetent and not in any way binding upon the defendant in this case and being taken before another officer.

Whereupon Mr. Heney on behalf of the Government stated that the proof was offered merely for the purpose of showing he did prove up and the date of such proof.

Whereupon the Court overruled the objection of the defendant and admitted the proof for that purpose.

To which ruling the defendant then and there excepted and his exception was allowed.

Whereupon the following question was asked on behalf of the Government.

Q. Now, from the time you filed until the time you made proof, how much of the time, if any, did you live on the land described on this homestead filing?

To which the defendant objected as incompetent, and in no way binding upon the defendant.

But the objection was overruled and the defendant excepted and his exception was allowed.

Whereupon the witness answered:

A. I didn't live on it at all.

Thereupon, subject to the same objection, ruling and exception, the witness was permitted to answer,

A. That he only visited the place he thought twice, that Mr. Zachary took him to it once, that he was only there a few hours, that there was furniture there in the cabin, but that he did not know who put them there, that he did not send them there or employ any one to send them there and that the cabin was a small structure

made of rough boards, that there was ground cultivated around there but that he did not know who cultivated it, that the land is
112 on the north side of the Company's pasture, that there was a fence on two or three sides of it and connected with other fences, that he didn't know who the other fences belonged to, that he didn't know whether it was before or after the filing that he got the lumber to build his house but that it was about that time, that some months after (witness thought it was after the house was built) he gave them a mortgage and note on the house for \$150 on the house in town, that he thought they got kind of afraid that they were going to lose their money and came to him and wanted a mortgage on the place, that they guessed he was not going to pay, or something—that he didn't agree to pay it, that he was to have the \$150 in lumber to go on the homestead, that Mr. Zachary asked him to sign the note and mortgage, said that Mr. Hendricks wanted it, and had him go to Mr. Hendricks' office and that he went and gave him a mortgage on the place, that Mr. Hendricks made out the mortgage—thought he made it out after witness got there.

Whereupon the following questions were asked the witness,

What was said there if anything at the time that mortgage was made out did you have any talk with Mr. Hendricks; was there anything said about the homestead?

A. I don't know.

Q. Was there anything said about when you were to pay the note or mortgage?

A. I was to pay the note when I proved up on the homestead.

Q. Was there anything of that kind said while you were executing it by Mr. Zachary or Mr. Hendricks?

A. I don't know if there was anything said but that was the understanding.

Q. From whom did you get that understanding?

113 A. Well, Mr. Zachary and I had a talk about it.

Q. What did he say?

A. He said to give him a mortgage. He said it would be all right and when I proved up on the homestead, why take it out.

Q. Was there any talk of that kind while you were in Mr. Hendricks' office, in regard to the note and mortgage?

A. I don't think so.

On the cross examination the witness testified in relation to the location of this homestead, the pasture, and the Butte Creek Pasture with reference to the Hawk claim.

Q. Now, this pasture, which you have talked about, that they call the big pasture; do you know how far that is from Fossil?

A. I don't know, where the border lines are; I do not know where all the lines are.

Q. About how far is it from Fossil?

A. I suppose you could reach it in about——

Q. In the nearest place, about how far from Fossil, in the nearest place?

A. About seven miles, I guess.

- Q. Seven miles in which direction from Fossil?
A. West, I think.
- Q. Do you know where the Davis place is, out four or five miles, out from the Butte Creek Land, Live Stock Company's mills—do you know where Thirty Mile is—do you—you do don't you?
A. Yes, sir.
- Q. Do you know where Hawk's claim is on Thirty Mile?
A. No, sir.
- Q. How close is the nearest point on this pasture to the nearest point on Thirty Mile Creek?
114 A. I don't know.
- Q. As near as you can tell?
A. I haven't any idea.
- Q. What say?
A. I haven't any idea; I don't know anything about it.
- Q. A long ways isn't it?
A. I guess it is.
- Q. Ten or fifteen miles?
A. I don't know how far it is.
- Q. Don't you know it is as much as ten miles or more?
A. It might be ten; it might be nearer, I don't know; I don't know how far the pasture lays that way.
- Q. You know it is a long way from the nearest point on the pasture to the nearest point on Thirty Mile Creek?
A. I guess it is a long ways, yes, sir.
- Q. If the Hawk place is on Thirty Mile Creek, it is a long way from the nearest point in that pasture, isn't it,—the Hawk claim?
A. I don't know anything about the Hawk claim.
- Q. I say, if the Hawk claim is on Thirty Mile Creek, it is a long way from the nearest point in that pasture?
A. Thirty Mile Creek might run into the pasture for all I know.
- Q. Don't you know Thirty Mile don't run into the pasture?
A. I don't know whether it runs through the pasture or not.
- Q. You don't know whether it does or not?
A. No, sir.
- Q. How far is your claim from Thirty Mile Creek?
A. I don't know.
- Q. You have no idea at all—a good many miles?
A. Well, it is a few miles, I know that.
- 115 Q. How far is your claim from the Butte Creek Land, Live Stock and Lumber Company's mill, about?
A. Oh, about eighteen or twenty miles, I guess.
- Q. How far?
A. About eighteen or twenty miles.
- Q. And the pasture is about eighteen or twenty miles from the Butte Creek Land, Live Stock and Lumber Company's mill, ain't it?
A. I guess the pasture is about fourteen miles.
- Q. About fourteen miles?
A. The nearest place.
- Q. What say?
A. I suppose the nearest line would be about fourteen miles.

Whereupon the attorneys for the defendant moved the court to strike out the testimony of the witness on the ground that it was incompetent, immaterial, and hearsay and collateral to the charge against the defendant and that the claim in question was entirely separate from the Hawk claim under consideration.

But the motion was overruled.

To which ruling the defendant excepted and his exception was allowed.

And be it further remembered, that during the trial of said cause the government elected to waive the charge in the indictment of subornation of perjury in the matter of Clyde Brown and to stand upon the charge of subornation of William Hawk, and thereafter and as a part of the Government's direct case, one HENRY NEAL was called as a witness.

The witness having testified that he had lived in Oregon all of his life and around Fossil about 18 years, that he was 25 years old, 116 that he had worked for the Butte Creek Land, Live Stock and Lumber Company about a year, that while he was working for them he hauled some lumber on the Clyde Brown claim; that he was told to haul the lumber by Mr. Zachary, that he and Mr. Zachary and Clyde Brown went together, that the frame part of the cabin on the Brown place was already up, that they put the floor in and the door and the stove.

And having testified that he had been there several times before that he had never seen anybody living there, was asked the question:-

Q. Was there a fence there at that time?

A. Yes, sir. There was a fence there on the east side of it.

Q. Where did that fence begin and where did it run to?

To which the defendant's attorneys objected as incompetent, immaterial and not in anyway connected with the offense upon which the defendant was being tried.

But the objection was overruled and the defendant excepted and his exception was allowed.

And thereupon the witness answered:

A. It commenced at West Fork, and ran to the Rim Rock on the mountain—over there.

Q. Do you know where that Rim Rock ran to?

Same objection, ruling and exception.

A. Why, it ran to the Breakes on the John Day, I think.

Thereupon the following question was asked:

Q. And was there a pasture there known as the John Day pasture?

Same objection, ruling and exception.

A. Yes, sir.

And thereupon subject to the same objection, ruling and 117 exception, the witness testified that the rim rock ran on the west side of the pasture, that this fence was on the south side,

that on the opposite end from the rim rock it connected with the ranches on the west fork—that there were some other fences over there, that they belonged to the Company, that the next claim to Clyde Brown's was Lee Smead's, that Smead was working for the Company at that time, that the next claim to Smead's was Dug Seller's, that he was a fellow who worked around there through the country, that witness thought he never worked for the Company, that witness didn't know where he was at that time, that there was a fence that ran along the Smead place and Seller's place, that he didn't know how the places lay, but that the fence ran right along the side of the ranch, that next to Seller's place came Mrs. Hamilton, that there was a fence along one side of that, that it joined the Seller's fence, that he never saw anybody on these places, that the land was not cultivated on any of them, that the next place to Mrs. Hamilton's was the Wilks' place, that there was some ranches on the West Fork and this pasture joined on these fences, that this pasture was what was known as the Butte Creek Company's pasture, that there was some spaces inside of the rim rock and these fences run around, that the witness put a floor in the Smead place and a door out of rough lumber; that Mr. Zachary employed him to do that, that this was the next day after he put the floor in at Brown's place, that he also put a floor and a stove and a door in the Hamilton place but did not remember just when this was, that he had something to do with the cabin on the Wilks' place, that he did not know whether it was tearing down the house, or putting in a floor, that Mr. Zachary had him do it.

And upon cross examination the witness testified as follows:

Q. Do you know where Thirty Mile Creek is?

A. Thirty Mile?

118 Q. Yes.

A. Yes, sir.

Q. Did you know the place known as the Davis place?

A. Yes, sir.

Q. Then you know where the Hawk claim is, beside the Davis place?

A. No, sir.

Q. If it is beside the Davis place, if it is right above the Davis place, right beside the Creek, you know where it is?

A. No, I don't know anything about it.

Q. If it joins the Davis place on the Creek above, right above the Davis place, joins on to the Davis place, you know where it is, where its location would be about?

A. I know where about it would be.

Q. You know about where it would be; you don't know where the lines lay, but you know about where it would be—how far is that from the Clyde Brown's place, that you have been testifying about?

A. Well, it was about——

Q. About how far?

A. To give a rough guess, I should judge it would be about eighteen miles.

Q. Twenty or thirty miles, isn't it?

A. No, about eighteen miles, I should judge.

Q. About eighteen miles, you would judge?

A. Yes, sir.

Q. And in an entirely different section of the country, isn't it?

A. Yes, sir.

119 Q. About how far is that place from the nearest point in the Butte Creek Company's pasture?

A. The nearest point?

Q. Yes?

A. That is what I am speaking of, about eighteen miles.

Q. About eighteen miles?

A. Yes, sir.

(It already conclusively appeared by other testimony offered by the Government that the Davis place and the Hawk place joined).

And thereupon the attorney for the defendant moved to strike out the testimony of the witness in relation to the Clyde Brown place, and in relation to the Butte Creek pasture,—the fencing of the Butte Creek pasture—as immaterial, incompetent, and collateral, and in no way bearing upon the charge that the defendant suborned perjury before the Grand Jury in the matter of the William Hawk claim.

But the motion was overruled and to that overruling the defendant excepted and his exception was allowed.

And be it further remembered, that after the Government had elected to stand upon the charge of subornation of perjury against William Hawk alone as hereinbefore set forth, one E. A. PUTNAM was called as a witness as part of the Government's direct case and testified that he went to the vicinity of Fossil in 1878 and continued to live there until 1903, that he lived on West Fork, east of Fossil that he knew where what was called the Butte Creek pasture, was, that it lay right west of his place, that he was familiar with the homestead claims in that vicinity.

Whereupon he was asked the question:

Q. Can you describe to the jury how this Butte Creek pasture was enclosed, if it was enclosed, in a general way?

120 To which the defendant objected as immaterial, incompetent and collateral to the question involved and in no way relating to the crime charged in the indictment, that is to the alleged subornation of perjury of the William Hawk, to testify falsely before the Grand Jury.

Whereupon Mr. Heney for the Government stated that it was offered for the purpose of showing knowledge and motive on the part of defendant Hendricks in connection with a general system.

Whereupon the objection was overruled and defendant excepted and his exception was allowed and the witness answered:

A. Well, on the East side it is enclosed by a fence that runs down to what they call the West Fork; those places were taken some time ago, that the company bought and on the West side it is enclosed by the rim rock, and on the north side mostly by rim rock, I think.

Whereupon the witness, subject to the same objection, ruling and exception, proceeded to testify that the rim rock on the west side was known as the John Day rim rock, that it is a high bluff which runs about parallel with the John Day River, that it is almost impossible for cattle or sheep to cross it, that the rim rock on the north was the same, it could be crossed in some places, in some it could not, that where it could be crossed there were fences.

And be it further remembered, that thereafter the said witness E. A. PUTNAM was asked the question:

Q. Was there any government land inside of this Butte Creek pasture to your knowledge?

To which the defendant objected as immaterial, incompetent and having no bearing on the case.

But the objection was overruled and the defendant excepted and his exception was allowed.

121 And thereupon the witness answered:

A. Yes, sir.

Whereupon the following question was asked:

Q. About how much?

Same objection, ruling and exception.

A. To the best of my knowledge about 18,000 acres.

That thereafter, one J. P. LUCAS was called as a witness and having testified that in '99 or 1900 he was Register of the U. S. Land Office at The Dalles, Oregon (in which land district this land was situated) and that he had examined a certain blue print which was exhibited to the Jury, and upon which the lines of the Butte Creek Company's pasture were marked, and having stated that he could state about how much public land there was inside of those lines on the 24th day of October, 1899, was asked the question:

Q. And what was the amount?

To which the defendant objected as immaterial, and incompetent and not bearing in any way on the charge in this indictment that this defendant suborned William Hawk to commit perjury before the Grand Jury.

But the objection was overruled.

To which ruling the defendant excepted and his exception was allowed.

And thereupon the witness answered:

A. 18,360 acres of unappropriated public land of the United States.

There was no evidence tending to show that the claim of William Hawk referred to in the indictment was nearer than 14 miles to any point of the Butte Creek pasture, referred to by the witness, and there was no testimony showing or tending to show that the

122 Hawk claim had ever been fenced, or that it was ever included in any pasture or made a part of any pasture by any one in any way connected with the Butte Creek Land Live Stock and Lumber Company, or any one in any way connected with the defendant.

Be it further remembered, That JAMES LOREN COMBS being called as a witness in behalf of the Government and as a part of its direct case testified that he lived in Gilliam County, had lived there about 32 years, was 41 years old, had lived in the Fossil country and was in the cattle business; his ranch was in section- 6 and 7, township 6 range 19 on the John Day River, that his land cornered with the northwest corner of the Butte Creek pasture, the Butte Creek Company's pasture heretofore referred to, that his cattle at one time ran inside of that pasture—that they were running in there at the time it was fenced, that was about the year 1899, that they did not stop running there but ran there during the year 1900 during the fall.

Whereupon the following question was asked:

Q. Then what happened?

To which the defendant objected to as immaterial, incompetent and not bearing in any way on the charge against the defendant of suborning Hawk to commit perjury before the Grand Jury.

Whereupon Mr. Heney in behalf of the Government stated that it was offered for the purpose of showing motive, and

Thereupon the objection was overruled, and

Thereupon the defendant *expected* and his exception was allowed.

Q. What happened in the fall of 1900 to your cattle?

• Same objection, ruling and exception.

— Well, some time during the fall I went in there to gather some of my cattle and while I was in there Mr. Zachary came to me.

Q. Cant Zachary?

A. Cant Zachary. I was riding alone.

123 Q. What did he say?

Same objection, ruling and exception.

A. He forbid me riding there alone, he said if I was going to ride alone I could not run my cattle in there.

And thereupon subject to the same ruling, objection and exception, the witness testified as follows:

Q. What do you mean by riding alone?

A. There was no one else riding except me, gathering cattle.

Q. And then what occurred?

A. I quit after I rode the next day, or the day following, I could not say which; I don't believe I rode the next day; I think it *was* the day after that, and then I didn't ride any more until the rest rode, to get the rodero cattle.

Q. That was the ride of the fall of 1900?

A. Yes sir.

Q. Did Mr. Zachary ever speak to you about it at any other time?

A. Well, never but once, I don't believe afterwards.

Q. When was that?

A. That was some time during the winter; I could not say what month it was.

Q. Where was it?

A. It was in the—A. B. Lamb's Drug-store.

Q. Is that the winter of 1901?

A. Yes, sir.

Q. Was any one else present?

A. Yes, sir; there was one party present.

Q. Who was it?

A. That I remember—it was a man by the name of William Griffith.

Whereupon the witness was asked the following question:

124 Q. What did Mr. Zachary say then, or what was said then in the presence of Mr. Zachary by you or Griffith or Zachary?

To which the defendant objected as incompetent, immaterial and in no way bearing upon the charge against the defendant of suborning Hawk to commit perjury before the Grand Jury.

But the objection was overruled.

To which ruling the defendant excepted and his exception was allowed.

And the witness answered:

A. Well, Mr. Griffith asked Mr. Zachary in regard to a cow of his, that I was coming out at the time that I met Mr. Zachary in the pasture, and he asked Mr. Zachary about the cow, if he had seen it. Now, I had put Griffith's cow along with what I had of mine, into Jim King's pasture, and when I went to take the cattle out, I didn't find Griffith's cow. I missed her and Griffith asked Mr. Zachary if he had seen the cow since, and Mr. Zachary said he hadn't and in our talk, it was brought up about my riding in there, and taking out cattle, and Mr. Zachary said he would not allow any man to ride in there alone, and if he caught anybody riding in there, he didn't say me, but anyone, he would put them out, and Mr. Griffith told him that there was too much Government land in there for him to do it, and he said it didn't make any difference how much Government land there was in there; there was no man that should go in there and ride, if he found them in there riding.

And be it further remembered, that thereafter one RUFUS RING was called as a witness on behalf of the Government as part of its direct case and testified as follows:

That he now lived in Portland, was working under one of the State officers, that he lived at Fossil in 1899-1900 or in that vicinity, was in the stock business and horses, had some horses of his own he was running that he had no place in particular of his own but was

125 stopping with a man by the name of Hamilton on the Hamilton place—David Hamilton, that he remembered the fences which run on the south side of what is called the Butte Creek pasture, along where the Clyde Brown place was, that after that fence was erected he saw Cant Zachary and Robert Zachary with some horses and thereupon he was asked the following question:

Q. What were they doing?

To which the defendant objected as immaterial and incompetent and in no way connected with the charge of subornation of perjury matter, referred to heretofore, but,

The objection was overruled and the defendant excepted and his exception was allowed,

Whereupon the witness answered:

A. Driving them out.

And thereupon the witness subject to the same objection, ruling and exception testified that they were driving them out of the pasture, that they were his horses, Shephard's, Putnam's and Scoggins', that Shephard's and Putnam's places were close to the pasture east of it about half a mile, or a little better, that he saw them driving out something in the neighborhood of 200 head.

And thereupon for the purpose of illustrating the evidence given by the witnesses who had testified in relation thereto, the certain map heretofore referred to by the witnesses Lucas and showing what purported to be the lines of the Butte Creek Land, Live Stock and Lumber Company's Butte Creek pasture was offered in evidence.

To which the defendant objected as dragging in collateral matter and as not tending in any way to prove the charges in the indictment that the defendant suborned William Hawk to testify falsely before the Grand Jury.

But the Court overruled the objection and admitted the map as illustrative of the testimony of the witnesses who had testified.

To which ruling of the Court the defendant then and there excepted and his exception was allowed

The following is a copy of the map. (Page 56.)

126 That during the trial of the said cause and at the proper time under the rules of said court the defendant asked the Court to instruct the Jury as follows: (1)

"The second count in the indictment charging the defendant with suborning the witness Brown is abandoned by the Government and upon that charge you should acquit."

But the Court refused said instruction in the words as asked and did not give the same except as the same is covered by the general charge, hereinafter set forth. To which refusal and modification the defendant excepted and his exception was allowed.

And be it further remembered, that at the trial of said cause and at the proper time required by the rules of the Court, the defendant requested the Court to charge the Jury as follows: (3)

"You should not therefore consider these charges of unlawfully obtaining and fencing Government land in any way, except as they may bear (if they do at all) upon the question of whether or

not defendant suborned the witness Hawk to testify falsely before the Grand Jury."

But the Court refused to give said instruction in the words asked by the defendant, and did not give the same except as covered by the general charge as hereinafter set forth. To which refusal and modification the defendant excepted and his exception was allowed.

And be it further remembered, that at the same time the defendant asked the Court to instruct the Jury as follows: (5)

"If Hawk committed the alleged perjury upon his own motion, and if he would have committed it anyway, without any inducement on the part of Hendricks, then you cannot find the defendant guilty, whatever he may have said to Hawk."

But the Court refused to give said charge in the words 127 (Page 57) asked, or in any way except as modified in the general charge.

To which refusal and modification the defendant excepted and his exception was allowed.

And be it further remembered, that on the trial of said cause and at the proper time under the rules of Court, the defendant handed up in writing and requested the Court to give the jury the following instruction:

"If you are in a state of reasonable doubt as to whether Hendricks induced the alleged perjury and as to whether the witness Hawk would have perjured himself just the same if he had had no talk with Hendricks at all, you should acquit."

But the Court refused said instruction, to which refusal the defendant excepted and his exception was allowed.

And be it further remembered, that on the trial of said cause and at the proper time under the rules of court the defendant handed up in writing and requested the Court to give the jury the following instruction: (7)

"If there was any crime committed by Hawk, or the defendant, in the matter of filing on his claim, or making final proof upon the same as shown by the evidence, it was outlawed, and could not be prosecuted at the time defendant is charged with having committed this crime."

But the Court refused to give said instruction, to which refusal the Defendant excepted and his exception was allowed.

And be it further remembered, that upon the trial of said cause and at the proper time under the rules of the Court, the defendant requested the Court to instruct the Jury as follows: (8)

"Before you could find the defendant guilty on this charge, it must be proven that the alleged false testimony was material to some investigation before the Grand Jury, and there is no evidence 128 that it was so material, and you should acquit."

But the Court refused said instruction and did not give the same.

To which refusal the defendant excepted and his exception was allowed.

And be it further remembered that on the trial of said cause and at the proper time under the rules of the Court, the defendant

handed in in writing and asked the Court to give the Jury the following charge: (9)

"In this case I charge you that you should bring in a verdict of acquittal for lack of sufficient evidence."

But the Court refused said instruction. To which refusal the defendant excepted and his exception was allowed.

129 And be it further remembered, that thereafter the Court charged the jury as follows:

GENTLEMEN: Although it is quite late, and I am sure we are all pretty well fatigued, yet I think it proper to submit the case to you and will endeavor to make myself as clear as I can upon the law that may be pertinent to the issues involved in the case.

This defendant, Hamilton H. Hendricks, is charged with the crime of subornation of perjury; that is, substantially with having wilfully and corruptly suborned, instigated and procured George W. Hawk, who testified before you, to appear before a grand jury of the Circuit Court of the United States at Portland, Oregon, and there to wilfully commit the crime of perjury. I will recapitulate the substantial averments of the indictment.

It charges that the grand jury of the Circuit Court of the United States, about January 15th, 1905, was inquiring among other matters, into certain criminal violations of the laws of the United States relating to public lands and the disposal of the same, and the unlawful fencing thereof which had then lately been committed within the District of Oregon.

It charges that Hawk was suborned to swear before the grand jury in substance and effect that when he, Hawk, made his application, dated October 19th, 1898 and filed in the Land Office of the United States at the Dalles, on October 21st, 1898, to enter certain public lands as a homestead under the laws of the United States, 130 the same was honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person, persons or corporation; that he Hawk, was not acting as agent of any person, corporation or syndicate in making such entry, nor in collusion with any such person, corporation, or syndicate to give him or them the benefit of the land so entered, and that he was not applying to enter the land for the purpose of speculation, but in good faith and to obtain a home for himself; that he had not made, and would not make any agreement or contract, with any person or corporation by which the title which he should acquire from the United States for said land would enure to the benefit of any person except himself, and that he himself paid the fees required by law to the paid upon the filing of his homestead application; and that when he, Hawk, upon March 2nd, 1900 subscribed and swore to his affidavit and testimony of final proof he had theretofore, to-wit, in April, 1899, commenced his residence on the said lands and had not sold, conveyed, or mortgaged any portion thereof, and thereupon Hawk, in consequence and by means of the said wilful and corrupt subornation, instigation and procurement of the defendant Hendricks, afterwards, on January 23rd, 1905, did appear in person before the United States Grand Jury

and was there duly sworn by the foreman and took his oath that he would testify truthfully, and that it then and there, upon the taking of the oath by Hawk before the grand jury, became and was a material question whether when he so made and filed his said application to enter the said lands as a homestead—the lands are particularly described but the exact geographical description is not material—the same was honestly and in good faith given for the purpose of actual settlement and cultivation, and whether it was made for the benefit of any other person, persons or corporation and whether he, Hawk, was acting as the agent of any person, corporation or syndicate in making such entry, or whether in making the entry he was in collusion with any person, corporation or syndicate to give them the benefit of the land so entered, and whether he was not applying to enter the lands for the purposes of speculation rather than in good faith to obtain for himself a home, and whether he had not made and would not make any agreement or contract with some person or persons, corporation or syndicate by which the title he should acquire from the United States to the land would enure to the benefit of some person except himself, or whether Hawk himself paid the fee, and whether when Hawk so subscribed and swore to his affidavit and testimony of final proof of settlement upon and cultivation of the lands he had, in April, 1899, or at any time commenced his residence upon the lands, and whether he had sold, conveyed or mortgaged any portion of the lands, and whether he himself paid the fee required by law to be paid upon making of such final proof.

The indictment charges that Hawk being so sworn, as aforesaid, then and there, upon his oath before the grand jury, falsely, wilfully and corruptly, and contrary to his oath, did testify and swear, among other things, in substance and to the effect that when he made his application to enter the lands as a homestead the same was honestly and in good faith made for the purpose of actual settlement and cultivation, and was not made for the benefit of any other person or corporation, that he was not an agent of any person or corporation, in making the entry, and that in making his entry he was not in collusion with any person, or corporation or syndicate, to give him or them the benefit of the lands so entered; that he was not applying to enter the lands for the purpose of speculation, but in good faith to obtain a home for himself, and had not made and would not make any agreement or contract with any other person or corporation by which the title which he should acquire would enure to the benefit of any person or corporation except himself; that he himself paid the fees required by law to be paid upon the filing of the application but that when he so subscribed and swore to his affidavit and testimony of final proof of settlement upon and cultivation of the said lands he had before then, in April, 1899, commenced his residence upon the land and had not sold, conveyed or mortgaged any portion of the land, and that he himself paid the fees required by law to be paid upon making the final proofs. Whereas, the grand jurors charge the fact to be that at the time when Hawk so made and filed his application that the same was not honestly and in good

faith made for the purpose of actual settlement and cultivation, but was made for the benefit of another person and a corporation, to wit, the defendant Hendricks, and The Butte Creek Land, Live Stock & Lumber Company, a corporation, and that he, Hawk was acting as agent of the said Hendricks and the said corporation in making the said entry, and was acting in collusion with the said Hendricks who was then the Secretary and Treasurer of the said corporation, to give the said Hendricks and the corporation the benefit of the lands so entered, and did apply to enter the land for the purposes of speculation rather than in good faith to obtain a home for himself and had made and would make an agreement and contract with the said Hendricks by which the title he should acquire from the said United States would be conveyed to the said Hendricks to enure to the benefit of the said Hendricks and the said corporation and its shareholders and did not himself pay any of the fees required by law to be paid on the filing of said application, and when the said Hawk so subscribed and swore to his affidavit and testimony of final proof of settlement upon and cultivation of the said lands, he had never commenced his residence upon the said lands and had sold and conveyed all of the said lands to the said Hendricks and

133 did not himself pay any of the fees required by law to be paid upon the making of the final proof; and whereas in truth, it is charged that Hawk at the time when he was so sworn and took his oath before the grand jury, did not believe to be true the said matters so by him sworn to as charged; and whereas in truth, the said Hendricks at the time and place when and where he so suborned, instigated and procured the said Hawk to take his oath and to testify and swear falsely, all as alleged in the indictment, well knew that said Hawk did not believe to be true the said matters which he, the said Hendricks, so then and there, suborned, instigated and procured him to testify, depose and swear before the grand jury; and whereas, in truth, that the defendant Hendricks did not then believe to be true the said matters which he so suborned, instigated and procured the said Hawk falsely to testify and swear to as alleged.

You will remember that there was another count in the indictment which alleged that the defendant Hendricks suborned one Clyde Brown to commit perjury, but as you have heard upon the trial counsel for the government have elected to rely upon the charge of subornation of the witness Hawk; so you will consider the case with reference to the guilt or innocence of the defendant Hendricks upon the charge of having suborned Hawk to commit perjury; that is, you are not trying him upon his guilt or innocence of any charge of subornation of perjury of the witness Clyde Brown. You are trying him solely upon the charge of subornation of perjury of the witness Hawk.

The statute of the United States, under which the indictment in this case is drawn reads as follows:

"Every person who procures another to commit any perjury is guilty of subornation of perjury."

Now perjury is defined this way by the laws of the United States.

134 "Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

The crime of subornation of perjury is somewhat confusing perhaps to the average mind, when it first considers it.

Remember, gentlemen, that the defendant Hendricks is not charged with having committed perjury. His offense, if any, is that of having procured a person, Hawk, who had testified, to commit perjury, and which the indictment alleges Hawk actually committed in consequence of such procurement.

The words subornation of perjury are easily understood when you remember that it is the offense of procuring a person to commit perjury, provided he actually does it.

Now the crime of subornation of perjury has several indispensable ingredients,

First, the testimony of the witness suborned must be false.

Second, it must be given wilfully and corruptly by the witness knowing it to be false.

Third, the suborner,—that is the person who procures the witness to commit perjury, must know or believe that the testimony of the witness given or about to be given will be false.

135 Fourth, the person who is charged to be a procurer must know, or believe, that the witness will wilfully and corruptly testify to facts which he knows to be false.

Now apply that in this case. It is necessary that the government should satisfy you, by the evidence, beyond a reasonable doubt, that the testimony of the witness Hawk given before the grand jury when he first testified before that body in the matter of his homestead entry and his residence thereof, and his taking it up for his own exclusive benefit and in respect to other matters charged in the indictment, was wilfully false.

Next, you must be satisfied, that the defendant Hendricks, who is charged as the suborner, must have known or believed that the testimony that Hawk gave, or was about to give before the grand jury, would be false.

Next, you must be satisfied that Hendricks knew, or believed that Hawk, as a witness, would wilfully and corruptly testify to facts which he knew to be false.

To constitute perjury, as it has been defined to you by the laws of the United States, a witness must wilfully testify falsely knowing the testimony given to be false. Of course if a man does not know or believe that a witness intends to commit the crime of perjury, he

could not be guilty of the crime of subornation of perjury. And if Hawk committed perjury at all, as alleged and did it upon his own motion, without the procurement of the defendant Hendricks, then Hendricks could not be convicted of having suborned him. So a witness by mistake or defective memory, may testify untruthfully, without being guilty of perjury, or any other crime.

The material matter concerning which the indictment alleges the grand jury were inquiring related to the public lands and the disposal of the same, and the unlawful fencing thereof within the District of Oregon.

The grand jury as a lawful body of the Circuit Court of the United States had a lawful right to inquire into these subjects, and if in the course of their investigation the acquisition of public lands by the defendant Hendricks, or the operations or the acquisition of public lands by the corporation, the Butte Creek Land, Live Stock & Lumber Company, was inquired into, it was proper for the grand jury to investigate into the acquisition of the homestead claim of the witness Hawk, and if they did so and investigated the acquisition of public lands by Hawk and others, the matter was material to the inquiry before them and it was proper for them, as a grand jury, to ascertain whether or not Hawk made his entry honestly and in good faith for the purpose of actual settlement and cultivation, and not for the benefit of any other person or corporation, and whether or not he was acting as the agent of any person or corporation in making the entry, or was in collusion with any person or corporation to give them the benefit of the land so entered, and whether he was not applying to enter the land for the purpose of speculation but in good faith and to obtain a home for himself, and whether or not he had made and would make any agreement or contract with any person or corporation by which the title he might acquire from the United States would enure to the benefit of any person except himself, and whether he had paid the fees himself required by law to be paid upon the filing, and whether or not in making his final proof he had, in April, 1899, commenced his residence upon the lands and had not sold or conveyed or mortgaged any portion thereof.

Something has been said to you about the matter of the statute of limitations, and its applicability to any crime committed if any was, by Hawk, in relation to his homestead filing and proof.

137 The statute of limitations, it is conceded, would have applied to that matter, but that did not prevent the grand jury of the Circuit Court of the United States from inquiring into the question of Hawk's homestead application and entry, if it was material, when the grand jury was inquiring into the acquisition of public lands, or the fencing thereof by this defendant, or the corporation of which he was an officer.

In order that you may understand the pertinency of the requirements of the homestead law of the United States, I will state to you some of the principal provisions of that act.

Every person who is the head of a family over the age of 21 and a citizen of the United States, or who has filed his declaration of intention to become such, shall be entitled to enter one quarter section

or less of unappropriated public lands to be located in a body in conformity to the legal subdivisions of public lands.

Any person applying to enter land under the homestead section shall first make and subscribe, before the proper officer, and file in the proper land office, an affidavit that he is the head of a family or over the age of twenty-one years and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person or persons, or corporation, and that he will faithfully and honestly endeavor to comply with the requirements of law as to settlement, residence and cultivation necessary to acquire title to the lands applied for; that he is not acting as agent of any person, corporation or syndicate in making the entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he does not apply to enter the same for the purpose of speculation, but in good faith to obtain a
138 home for himself, and that he has not, directly or indirectly, made and will not make any agreement or contract in any way or manner with any person or persons, corporation or syndicate, whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself, and upon filing such affidavit with the register or receiver on payment of the fees he shall thereupon be permitted to enter the amount of land specified.

The great object of the homestead laws of the United States, gentlemen, was to grant land to actual bona fide settlers, persons making settlements upon the public lands for use as homesteads, and to encourage residence upon, cultivation and improvement of the public domain. It is generally provided that no certificate shall be given or be issued until the expiration of five years from the date of the entry provided for, and if at the expiration of such time, or any time within two years thereafter the person making such entry proves by two credible witnesses that he has resided upon or cultivated the land for the term of five years immediately succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as specially provided, and that he will bear true allegiance to the government of the United States, then in such cases he shall be entitled to patent.

In respect to the commutation of a homestead, the law provides that a person who avails himself of the benefit of the homestead may pay the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of entry and obtain patent therefor upon making proof of settlement and of residence and of cultivation for such period of fourteen months; but the right of commutation of a homestead depends upon prior compliance with the homestead law in good faith up to the date
of commutation.

139 The law pertaining to homesteads is not complex in its essential requirements.

Now consider what the applicant must swear to when he first files

his said application; that he is the head of a family, or over twenty-one years old; that his application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person; that he will faithfully and honestly endeavor to comply with the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for; that he is not acting as agent for any person in making such entry, nor in collusion with any person to give him the benefit of the lands entered; that he does not apply to enter the lands for the purpose of speculation, but in good faith to obtain a home for himself; and that he has not directly or indirectly made, and will not make any agreement or contract in any manner or *manner* with any person or corporation by which the title he may acquire from the government shall enure, in whole or in part, to the benefit of anyone but himself.

Now, when it comes to his final proof the applicant is asked, among other things, when his house was built on the land, and when he established actual residence, and of whom his family consists, and whether the applicant and his family have resided continuously on the land since first establishing residence thereof, and for what period or periods he has been absent from the homestead since making settlement, and if temporarily absent whether the applicant's family resided upon and cultivated the land during such absence; how much land has been cultivated, as to the character of the land, whether he had sold, mortgaged or conveyed any portion of the land, and other questions appearing in the testimony on the final proof which are intended to elicit proof as to whether the applicant has complied with the laws as a bona fide actual settler.

Good faith, when we speak of it with relation to the public land laws of the United States, means honesty. Good faith is the opposite of bad faith. And whether or not there has been good faith, in for instance the entry of Hawk, is a question for you to determine, considering all the facts and circumstances bearing upon the acts of the homestead applicant to establish a residence as required by the homestead law. There must be a combination of act and intent: the act of occupying and living upon the claim, and the intention of making the same a home to the exclusion of a home elsewhere. Inhabitaney must exist in good faith. I do not regard it as a compliance with the homestead law for a man to file on a tract of land with no intention of making it his home, with no purpose to live there, with no intention of cultivating any part of it, and of acquiring it for a place to reside in. Occasional visits made for a few hours, or for a day or two every six months to a claim taken up as just stated, and made not in good faith but solely for the purpose of attempting to comply technically with the requirements of the law, do not constitute a compliance with the statute.

On the other hand, if a man is really in good faith and means to establish his home, and in good faith settles upon the land and cultivates it, and fixes his home there, the law will sustain him in his application and proof, even though he be absent for not more than six months from such home, such absence being however with intent

and in good faith to return to his homestead and being reasonably necessary to enable him to maintain himself and his family, or he would be excused if temporarily absent on account of sickness, or an unavoidable casualty or necessity occurring after he has established his residence upon the land.

The homestead law in forbidding the applicant to make,
141 directly or indirectly, any agreement or contract in any way or manner with any person by which the title to the land acquired from the government shall enure in whole or in part to the benefit of any person except himself, means by the word "agreement" that there must be a meeting of minds, expressed in some tangible way, and it must be intended in some way to be binding upon the parties. One party may have intended to sell, and the other party may have intended to buy, and yet this would not be enough unless the intention of each was in some way communicated from the one to the other and was understood and agreed to by both.

An agreement, as the word "Agreement" is used, need not be in writing. It need not be of sufficient formality, or of a nature to be enforceable in Court; it is enough if it is proved beyond a reasonable doubt that in some way the minds of the applicant and some other person have met definitely, understandingly; that there is a mutual consent upon their part that when the applicant may acquire title to the land from the United States it shall enure to the benefit of such other person for a consideration; that is, if in truth and in fact the applicant is really to acquire the land for the use and benefit of another, any words, or any acts and words manifesting this mutual consent of the minds of the parties are sufficient to constitute a contract for agreement.

After a settler in good faith has proved up or commuted, if he has complied with the law honestly and in good faith, and has received the certificate or receipt from the receiver of the Land Office, then he has a dominion over the land he may sell it or dispose of it.

I will again, gentlemen, tell you that the charge against this defendant is subornation of perjury, and however culpable you may
believe him to have been with reference to any offense testified
142 to, but not charged in the indictment, or however well established you may deem his criminality in connection with any offense other than that charged, you cannot find him guilty of subornation of perjury, unless you find beyond a reasonable doubt that he has committed the crime defined in the instructions and as is charged in the indictment.

There has been some testimony introduced before you tending to show the defendant has been implicated in the violation of the laws of the United States other than the particular offense charged. This evidence was offered as tending to establish knowledge or design, or that there was a system in the acts of the defendant, or as tending to explain his motive in the doing of the particular act that he is charged with having done. For example, there is some evidence tending to show that there has been an unlawful enclosure of the public lands by the defendant or his company, but he cannot be convicted on this trial of unlawfully fencing government lands,

nor indeed for unlawfully obtaining lands even if the testimony should show that he has done so in instances. But the testimony upon these matters was properly before you, and as bearing upon the question of his knowledge in the doing of the act charged, or his motive in doing the act charged, or in explaining that he may have had a system it bears upon the question of his guilt or innocence of the particular charge upon which he is being tried.

The defendant was a witness before you. He had a right to testify in his own behalf, and it is the duty of the jury to weigh his testimony carefully in connection with all other evidence in the case, but in weighing it you should remember that he is the defendant, consider his interest in the result of the trial, and you may take into consideration the nature and enormity of the offense with which he stands charged.

He is presumed to be innocent until his guilt is established, beyond a reasonable doubt, and when you come to weigh
143 the testimony of the witnesses you must remember that you are the exclusive judges of their credibility. The court can help you in defining the law, but in passing upon the credibility of the witnesses you must remember that is your exclusive province.

The defendant has introduced evidence tending to establish the fact that he had always borne a good character for truth and veracity prior to the finding of this indictment. It is your duty to consider this in connection with all the other testimony and facts in the case, and if after a consideration of the whole case you have a reasonable doubt of his guilt you should acquit him, but if you are satisfied of his guilt beyond a reasonable doubt, you should convict him; for his previous good character would neither excuse him nor justify the offense.

The presumption is that the witnesses speak the truth, but this presumption may be overcome by evidence which contradicts him, or which may affect his or their reputation for truth, honesty and integrity; or by the manner of the witness or witnesses upon the witness stand, or by evidence which shows that he or she has made statements at other times, or given testimony inconsistent with his or her present testimony; and if you believe that any witness has wilfully sworn falsely as to any material matter upon the trial, you are at liberty to reject the entire testimony of such witnesses, except in so far as it may be corroborated by other credible evidence.

A reasonable doubt, as I have used the words throughout this trial, is not such a doubt as any man may start by questioning for the sake of a doubt, nor a doubt suggested or surmised without foundation from the evidence or the testimony. It is such a doubt only as a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other matters of the highest importance, prevents the jurors from coming to a conclusion in which their minds rest satisfied. If so using
144 the mind and considering all the evidence produced it leads to a conclusion which satisfies the judgment and leaves upon

the mind a settled conviction of the truth of the fact, it is the duty of the jury so to declare the fact by their verdict.

It is possible always to question any conclusion derived from the testimony, but such questioning is not such a reasonable doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

There is some testimony before you, gentlemen, to the effect,—indeed it is not seriously disputed, I take it,—that the witness Hawk admitted before the grand jury that he had sworn falsely in relation to his homestead application and proof when he first made his statement before them. Any admissions made by Hawk before the grand jury that he had sworn, wilfully, falsely in relation to this matter are to be considered as bearing upon the question of whether or not Hawk did wilfully and knowingly swear falsely before the grand jury; that is, they bear upon that ingredient of the offense which I have defined to you to be one of the essential ingredients of the crime of subornation of perjury; and with that limitation they should be considered.

So a number of the grand jurors have testified before you with relation to what occurred before the grand jury, what the subject under investigation was. You should consider that as bearing upon the matter that they had before them, and their statements as to what Hawk said by way of a confession are limited to the question of whether or not Hawk did or did not commit perjury before the grand jury which, as I have said is an ingredient,—one of the four ingredients that I have explained to you must exist in order to constitute the crime of subornation of perjury. ,

145 Of course the jury will understand it was essential, in order to convict you must be satisfied from the evidence beyond a reasonable doubt that the defendant procured him to do it.

And thereupon at the proper time and in the presence of the Jury before the jury had retired, the defendant excepted to the giving of that part of the charge which was as follows:

"The grand jury as a lawful body of the Circuit Court of the United States had a lawful right to inquire into these subjects, and if in the course of their investigation the acquisition of public lands by the defendant Hendricks, or the operations or the acquisition of public lands by the corporation, the Butte Creek Land, Live Stock & Lumber Company, was inquired into, it was proper for the grand jury to investigate into the acquisition of the homestead claim of the witness Hawk, and if they did so and investigated the acquisition of public lands by Hawk and others, the matter was material to the inquiry before them."

upon the ground that the same was not sustained by the evidence in the case and that there was no evidence that any such testimony became material to the investigation before the grand jury.

And the exception was allowed.

And be it further remembered, that thereafter in open court at the proper time and before said jury had retired and in the presence

of the jury, the defendant excepted to that part of said charge which was as follows:

"It was proper for them, as a grand jury, to ascertain whether or not Hawk made his entry honestly and in good faith for the purpose of actual settlement and cultivation, and not for the benefit of any other person or corporation, and whether or not he 146 was acting as the agent of any person or corporation in making the entry, or was in collusion with any person or corporation to give them the benefit of the land so entered, and whether he was not applying to enter the land for the purpose of speculation but in good faith and to obtain a home for himself, and whether or not he had made and would make any agreement or contract with any person or corporation by which the title he might acquire from the United States would inure to the benefit of any person except himself, and whether he had paid the fees himself required by law to be paid upon the filing, and whether or not in making his final proof, he had, in April, 1899, commenced his residence upon the lands and had not sold or conveyed or mortgaged any portion thereof."

upon the ground that the same was not sustained by any evidence in the case and that there was no evidence that any such testimony became material to the investigation before the Grand Jury and that the same was misleading and not sustained by the evidence in the case.

And the exception was allowed.

Be it further remembered, that thereupon and during the trial of said cause, before the jury had retired, the defendant excepted to each paragraph of said charge in relation to the homestead law and the requirements of the homestead law and the requirements of the applicant for the land, and the requirements of the final proof, on the ground that each of said paragraphs were abstract and misleading to the jury and tended to make the case turn on the proposed good faith of the witness Hawk in making his homestead entry.

And the exception was allowed.

147 Be it further remembered, that thereupon at that time and before the jury had retired, the defendant excepted to the giving of that portion of said charge which reads as follows:

"There is some testimony before you, gentlemen, to the effect—indeed it is not seriously disputed, I take it,—that the witness Hawk admitted before the grand jury that he had sworn falsely in relation to his homestead application and proof when he first made his statement before them. Any admissions made by Hawk before the grand jury that he had wilfully sworn falsely in relation to this matter are to be considered as bearing upon the question of whether or not Hawk did wilfully and knowingly swear falsely before the grand jury; that is, they bear upon that ingredient of the offense which I have defined to you to be one of the essential ingredients of the crime of subornation of perjury; and with that limitation they should be considered."

"So a number of the grand jurors have testified before you with relation to what occurred before the grand jury, what the subject under investigation was. You should consider that as bearing upon the matter that they had before them, and their statements as to what Hawk said by way of a confession are limited to the question of whether or not Hawk did or did not commit perjury before the grand jury which, as I have said, is an ingredient, one of the four ingredients, that I have explained to you must exist in order to constitute the crime of subornation of perjury."

upon the ground that the same was not the law and misleading.

And the exception was allowed.

148 And now therefore, this bill of exceptions having been saved by the time required by the Court and having been examined and amended until the same corresponds with the facts, is now, together with the amendments hereto attached, filed and made a part of the records of this cause.

Dated this May 3, 1907.

WM. H. HUNT, *Judge*.

STATE OF OREGON,

County of Multnomah, ss:

Due and legal services of the foregoing bill of exceptions upon me at Portland, in Multnomah County, District and State of Oregon, this — day of November, 1906, is hereby acknowledged.

W. C. BRISTOL,

United States District Attorney for the District of Oregon.

149 In the Circuit Court of the United States for the District of Oregon, Ninth Judicial Circuit.

UNITED STATES OF AMERICA, Plaintiff,

vs.

HAMILTON H. HENDRICKS, Defendant.

Amendment to Proposed Bill of Exceptions.

I.

In the suggested form of the bill of exceptions the United States desires the following added to the proposed bill of exceptions in order that the same may conform to the record, that is to say that following page 56 of said proposed bill of exceptions, and between pages 56 and 57 of the same, the following be added:—

"It is certified that all of the foregoing evidence was admitted and received under the announced and followed theory of the government with the limitation that it was so offered and so admitted and received to show motive, system, knowledge, design and intent on the part of the defendant Hendricks the evidence in the case showing that the said Hendricks was connected with and one of the members of the said Butte Creek Land & Livestock Company, which

had enclosed some eighteen thousand acres of public lands of the United States for pasture, and that all the said foregoing evidence was so received and admitted for the limited purposes afore-
 150 said as evidence of motive, intent and knowledge on the part of the defendant Hendricks in suborning the witness Hawk, as charged in the indictment, to keep from discovery the method of taking Hawk's proof in the same manner as said evidence showed proofs were taken by said Hendricks and availed of by said Butte Creek Land & Livestock Company in which said Hendricks was connected, and, he, the said Hendricks, then and there acting in respect of said proofs so availed of by said company as United States Commissioner, and that the said transactions of the Butte Creek Land & Livestock Company so participated in by Hendricks as member thereof, showed motive, system, knowledge, intent and design in commission of the matters charged in the indictment."

II.

And following said last above matter, and between it and page 57 of said proposed bill of exceptions, that the following be added, to-wit:—

"That evidence was introduced by the Government showing that Hawk, mentioned in the indictment, was asked by defendant Hendricks to take up a claim; that Hawk did so; that Hawk filed before Hendricks; that Hawk proved up before Hendricks; that Hawk himself did not pay the filing fees or entry money; that the same was paid by Hendricks or by the Butte Creek Land & Livestock Company; that Hendricks gave on slips of paper the items of
 151 money paid out and disbursed by him, Hendricks, to Hawk to the bookkeeper of the company at the company's mill to be charged to the account of Hawk on the company's books, and that the said items were so charged.

WM. C. BRISTOL,
Attorney for the United States.

Amendments allowed.
 W. H. HUNT, *Judge.*

May 3, 1907.

Proposed bill of exceptions filed Nov. 14, 1906.
 J. A. SLADEN, *Clerk.*

Bill of Exceptions allowed and filed May 3, 1907.
 J. A. SLADEN, *Clerk,*
 By G. H. MARSH, *Deputy.*

152 And afterwards, to wit, on Monday, the 3rd day of August, 1908, the same being the 98th Judicial day of the Regular April, 1908, Term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge for the District of Oregon, presiding, the following proceedings were had in said cause, to-wit:

153 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA

vs.

H. H. HENDRICKS.

Indictment, Section 5393, R. S.

AUGUST 3, 1908.

Now, at this day, on motion of Mr. Tracey C. Becker, Special Assistant to the Attorney General of the United States, it is ordered that the time for passing sentence upon said defendant be, and the same is hereby, postponed until the October, 1908, Term of this Court.

154 And afterwards, to wit, on Friday, the 30th day of April, 1909, the same being the 17th Judicial day of the Regular April, 1909, Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

155 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

April 30, 1909.

THE UNITED STATES OF AMERICA

vs.

HAMILTON H. HENDRICKS.

Indictment, Section 5393 R. S., U. S.

Now, at this day, come the plaintiff by Mr. Tracey C. Becker, Special Assistant to the Attorney General of the United States and Mr. John McCourt, United States Attorney, and the defendant Hamilton H. Hendricks in his own proper person; Whereupon, the motion of said defendant for a new trial herein is submitted to the Court without argument, and the Court having considered said motion, it is ordered and adjudged that said motion be, and the same is hereby, denied.

Whereupon, said plaintiff moves the Court for judgment upon the verdict of the jury heretofore filed herein; It is therefore Considered that said defendant do pay a fine of five hundred dollars (\$500.00) and that he be imprisoned for the period of thirteen

months, and it is ordered that, until otherwise ordered or provided, this sentence of imprisonment be executed in the United States Penitentiary at McNeil's Island in the State of Washington, and that said defendant stand committed thereto until this sentence be performed or until he be discharged according to law.

And, thereupon, on motion of said defendant, it is ordered that execution of this sentence be stayed pending the application of said defendant for a Writ of Error herein, upon the filing by said defendant of a bond in the sum of five thousand dollars (\$5,000.00) for his appearance before this Court in execution of this sentence whenever called. And it is further ordered that the clerk of this Court may take the acknowledgment of said bond and the justification of the sureties thereon.

156 And Afterwards, to wit, on the 28th day of September, 1909, there was duly filed in said Court, a Petition for Writ of Error and Assignment of Errors, in words and figures as follows, to wit:

157 In the United States Circuit Court for the District of Oregon.

UNITED STATES OF AMERICA, Plaintiff,

vs.

HAMILTON H. HENDRICKS, Defendant.

Petition for Writ of Error.

Your petitioner, the above named Hamilton H. Hendricks, defendant in the above entitled cause, brings this his petition for a writ of error, to the Circuit Court of the United States, for the District of Oregon, and thereupon your petitioner shows:

That on the 30th day of April, 1909, there was rendered and entered in the above entitled Court and in the above entitled cause, a judgment against your petitioner, wherein and whereby your petitioner, the said Hamilton H. Hendricks, was adjudged and sentenced for a term of thirteen months in the United States penitentiary at McNiels Island, and to pay a fine of Five Hundred Dollars (\$500); and your petitioner shows that he is advised by counsel that there was manifest error in the records and proceedings had in such cause, and in the rendition of said judgment and sentence, to the great injury and damage of your petitioner, all of which will be more fully made to appear by an examination of the said records and more particularly by an examination of the bill of exceptions by your petitioner tendered and filed therein, and in the assignment of errors thereon, hereinafter set out, and to that end, therefore, that the said judgment, sentence and proceeding may be reviewed by the Supreme Court of the United States, your petitioner now prays that writ of error may be issued, directed therefrom to the said Circuit

158 Court of the United States for the District of Oregon, returnable according to law and the practice of the Court, and that there may be directed to be returned pursuant thereto,

a true copy of the record, bill of exceptions, assignment of errors and all proceedings had in said cause, that the same may be removed into the said Supreme Court of the United States to the end that the error, if any hath happened, may be duly corrected, and full and speedy justice done your petitioner.

Your petitioner now makes the assignment of errors attached hereto, upon which he will rely, and which will be made to appear by a return of the said record in obedience to said writ.

Wherefore, your petitioner prays the issuance of a writ as hereinbefore prayed, and prays that the assignment of errors annexed hereto, may be considered as his assignment of errors upon the writ and that the judgment rendered in this cause may be reversed and held for naught, and said cause be remanded for further proceedings.

HAMILTON H. HENDRICKS, *Def'd nt.*
ALFRED S. BENNETT,

Attorney for Plaintiff.

159 In the Circuit Court of the United States for the District of Oregon.

U. S. AMERICA, Plaintiff,

vs.

HAMILTON H. HENDRICKS, Defendant.

Assignment of Errors.

Hamilton H. Hendricks defendant in the above entitled cause, and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a writ of error to said Court directed from the Supreme Court of the U. S. to revise the judgment and sentence made and entered in said cause against said Hamilton H. Hendricks defendant in error and petitioner herein; now makes and files with the said petition the following assignments of error herein, upon which he will rely for the reversal of said judgment and sentence upon the said writ, and says that in the records and proceedings in the above entitled cause, upon the trial hearing and determination thereof in the Circuit Court of the U. S. for the District of Oregon there is manifest error in this, to-wit:

First. That said Circuit Court erred in overruling the demurrer of the said defendant Hamilton H. Hendricks to the indictment filed in said action.

Second. In Overruling the objection of the defendant to the introduction of any and all testimony in said cause, upon the ground that the indictment in the case did not set forth sufficient facts to constitute a crime and in permitting evidence to be offered to the jury in said cause over said objection.

160 Third. In overruling the motion of the defendant at the close of the Government's case to withdraw the case from the jury and to dismiss and non-suit the same on the ground

that there was not sufficient evidence of the materiality of the statement charged in the indictment to have been made falsely and not sufficient evidence of the materiality of said alleged false statement, and in not allowing said motion, and denying and refusing the same.

Fourth. In refusing the following instruction asked for by the defendant. (No. 8) "Before you could find the defendant guilty on this charge it must be proven that the alleged false testimony was material to some investigation before the Grand Jury and there is no evidence that it was so material and you should acquit."

Fifth. In said Court charging the jury as follows:

"It was proper for the Grand Jury to investigate into the home-stead claim of the witness Hawks, and if they did so and investigated the acquisition of the public land by Hawks and others, the matter was material to the enquiry before them."

Sixth. Said Court erred in charging the jury in said case as follows:

"And it was proper for them as a Grand Jury to ascertain whether or not Hawks made his entry honestly and in good faith for the purpose of actual settlement and cultivation, and not for the benefit of any other person or corporation, and whether or not he was acting as an agent for any person or corporation in making the entry or was in collusion with any person or corporation to give them the benefit of the land so entered and whether he was not applying to enter the land for the purpose of speculation, but in good faith and to obtain a home for himself, and whether or not he had made, or would make, any agreement or contract with any person

161 or corporation by which the title he might acquire from the U. S. would inure to the benefit of any person except himself, and whether he had paid the fees himself, required by law to be paid upon the filing, and whether or not in making his final proof he had in April 1899 commenced his residence upon the land, and had not sold, conveyed or mortgaged any portion thereof.

Seventh. In refusing to charge the jury as follows:

"If there was any crime committed by Hawk or the defendant in the matter of filing on this claim or making final proof upon the same, as shown by the evidence, it was outlawed and could not be prosecuted at the time defendant is charged with having committed this crime.

Eighth. That said Court erred in permitting the witness A. Bettinger to be asked the following question:

Q. "Did he make any other statement afterwards?"

And in overruling the defendant's objection hereto upon the ground that said statement was post-dating the alleged perjury, and self-serving in its character, and incompetent as against the defendant in this case, and not binding upon the defendant; and in permitting said witness to answer said questions as follows:

A. "He made another statement afterwards." The sweat commenced to pour down his cheek and he made a statement again afterwards—well, after the first statement, then he said I am willing—he walked the floor—he made a few steps and said "well, I will tell the Grand Jurymen the truth," he says, and he said "I was taking

this land up for somebody else, and he said first he was taking it all up for himself, and when he told the truth he said it was for somebody else."

Ninth. In permitting said witness Bettinger to be asked the following:

162 Q. "Before he told the truth did he say whether or not he had made any contract to sell the land before making final proof? Did he claim he was making final proof on the land for himself or had made an agreement to sell it?"

In overruling the objection thereto and permitting said witness to answer said question as follows:

A. "I am not sure about that, but it seems to me that he had a contract as I remember right, he had a contract that the land was going over to another party."

Tenth. In permitting said witness Bettinger to be asked the following question:

Q. "Do you remember whom he had offered to sell it to?"

And in overruling the defendant's objection hereto and in permitting said witness to answer as follows:

Q. "It seems to me like Hendricks."

Eleventh. In permitting said witness Bettinger to refresh his memory from the indictment as to the testimony of Clyde Brown in response to the following question and statement of counsel for Government:

Q. "I will ask you to read the alleged indictment in this case which is now handed you, that portion of it relating to subornation of Clyde Brown for the purpose of refreshing your recollection in regard to what it was that Clyde Brown testified to before the Grand Jury which became the basis of this indictment for him—his subornation—it begins at 2."

And in overruling the defendant's objection to witness refreshing his memory from the indictment on the ground that there was no proper foundation laid, that it had not been shown to be the paper proper for him to refresh his memory from, or drawn by him, or under his direction, or at a time when the facts were fresh in his memory, and in permitting the witness after refreshing his memory from said paper to testify as follows:

163 Q. "Did you know the contents of that indictment at the time it was turned into Court? You went with the Grand Jury at the time you turned it into Court?"

A. "Yes, sir."

Q. "Did you know its contents then?"

A. "We didn't read it over, every one of these then, at the time—maybe the Grand Jury did—we know the substance of it."

Q. "Did you know what the substance in there was as regards what Clyde Brown had testified to?"

A. "Yes, sir. Certainly."

Q. "And did it correctly state the substance at the time; did you believe it correctly stated—the substance of what Clyde Brown had testified to?"

A. "Of course."

Q. "And you still believe it?"

A. "And can you say from that, after reading it, have you—can you recollect after reading that?"

A. "I know more about it now, of course." And was asked the following question:

Q. "Can you give in substance as to what Clyde Brown testified to?"

A. "He testified to just about the same that Hawk did and that he had built fences and built a house and taken it up for himself, and afterwards he testified—he just reversed the thing."

Twelfth. In permitting the witness W. H. H. Wade to be asked the following question in relation to the witness Hawk before the Grand Jury questioned him:

Q. "What did he say afterwards, after he had changed his story?"

And in overruling the defendant's objection thereto, that the same was incompetent, immaterial, self serving and not in any way binding on the defendant and hearsay. And in permitting said witness to answer:

164 A. "He said I have been lying to you."

Thirteenth. In permitting said witness Wade to be then asked the following question:

Q. "Go on and tell what he said now."

In overruling the defendant's objection thereto as before and in permitting said witness to answer:

A. "Well, he says, as far as my memory serves me, I won't say it was in just these words—he says it is no use of my trying to deceive you men any longer. He says, I have been trying to deceive you but I see it is no use, or something to that effect; that is the sum and substance as well as I remember."

Fourteenth. In permitting said witness in the same connection and over the same objection, to be questioned, and answer as follows:

Q. "Then what did he tell you as being the fact?"

A. "Well, I can't give—can't remember the words that he used, but it was that he had taken it up for some other, but that he had been induced or influenced by other parties to take up the land."

Q. "Do you know who the parties were who he said he was taking it up for?"

A. "I don't know—I can't—I don't bear in mind just now—that is who the parties were—whether it was for—"

Q. "Do you remember who he said the land was to go to?"

A. "No, I don't just call to mind at present just what statement he made to that."

Q. "Do you recollect any parties it was to go to?"

A. "To this Company."

Fifteenth. In permitting said witness to be asked, over the same objection and in the same connection, the following question:

Q. "Which company?"

And in overruling said objection to the same and in permitting the witness to answer hereto:

165 Q. "Why, the Butte Creek Company, but I say I cannot remember whom it was—who had made—who it was—the

different ones—whether he named any different individuals or not; I don't know about that."

Sixteenth. In refusing the defendant to strike out that part of the answer of the witness John W. Jory wherein he had stated in relation to the testimony of Hawk before the Grand Jury as follows:

A. "Later he acknowledged that he had been induced to take up this place for the benefit of other parties."

Upon the grounds that it was not responsive to the question, incompetent, immaterial and in no way binding upon the defendant and hearsay.

Seventeenth. In permitting said witness Jory to testify over the objection of the defendant that the same was incompetent and not binding upon the defendant and hearsay, that Hawk testified as he remembered it:

"That the money for the filing fees was advanced by the Company and not by himself, and that at the time he made the filing he was to get the money—he was to file for the Company and they would bear all the expenses."

Eighteenth. In permitting witness F. G. Buffum to be asked the following question:

Q. "Now, do you remember what he said afterwards as to taking up the homestead? After he had commenced—after he had made this statement that he was going to tell the truth?"

And in overruling the defendant's objection that it was incompetent, immaterial and in no way binding upon the defendant and hearsay and in permitting said witness to answer:

A. "He said he was approached up there in regard to 166 taking a homestead, that he filed on it, and that all the expenses were paid by the Butte Creek Company, and I forget the amount of money he was to receive, but I think it was \$300 when the final proof was issued."

Nineteenth. In permitting the witness John W. Morgan to be asked the following question (referring to a talk with Mr. Zachary).

Q. "And what was that talk?"

And in overruling the defendant's objection to the same upon the ground that it did not appear that at the time this talk with Mr. Zachary was had that he was in any position to bind the defendant and was not even a member of the Company of which Mr. Hendricks was a member, and in permitting said witness to answer:

A. "Why, he asked me to take up the homestead and asked me if I wanted to take up a claim, and I told him I would, and I went and filed on a claim, that is all."

And in permitting the said witness to be asked and to answer the following questions in the same connection and over the same objection:

Q. "Was that all?"

A. "Well, I was to receive \$300 for the claim."

Q. "Did he tell you that?"

A. "Yes, sir."

Q. "Did he give you any money then?"

A. "Not then, no."

Q. "Did he at any time after?"

A. "No, Zachary never gave me any money?"

Q. "Did anybody give you any money?"

A. "Yes, sir."

Q. "Who?"

A. "Well, I got it out of Steiwer's and Carpenter's store. Mr. Carpenter handed me \$200."

Q. "How long after you filed?"

167 A. "Oh I don't know; it was a few months, I guess, a month or two, I don't know it might have been more."

Q. "Now, what became of the first homestead claim?"

A. "I relinquished it."

Q. "Where was that located?"

A. "I don't know I never saw it."

Q. "You never saw it."

A. "No."

Q. "Did Zachary tell you where it was at the time you filed?"

A. "I don't think so."

Q. "Did he tell you it was any way near the land he had anything to do with?"

A. "He didn't say."

Q. "Now then, at the time you filed the second homestead filing did you have any talk with anybody before you made the filing?"

A. "Yes, sir, I had a talk with Mr. Zachary."

Q. "With Mr. Zachary?"

A. "Yes, sir."

Q. "Can't Zachary?"

A. "Yes, sir."

Q. "What did he say to you about it?"

A. "Of course,— * * *

Q. "What did he say?"

A. "He asked me if I wanted to take up a—he wanted to know if I wanted to take up a homestead for him and I asked him what I was going to get for it, and he told me what I would get when I had taken up the claim."

Q. "What did he tell you he would do?"

A. "He told me he would give me \$150 worth of lumber, and when I had proved up on the claim he would give me \$150 in addition to that."

168 Twentieth. In overruling defendant's objection to the Government's exhibits 33 being the final proof papers of the witness John W. Morgan to his homestead made before James Stewart and in overruling the objection of the defendant hereto, that the same was immaterial, incompetent and in no way binding upon the defendant and permitting the same to be read in evidence.

Twenty-first. In permitting said witness John W. Morgan to be asked the following questions by the Attorney for the Government:

Q. "Now, from the time you filed until the time you made proof, how much time, if any, did you live on the land described on this homestead filing?"

And in overruling the defendant's objection to the same as in-

competent and in no way binding upon the defendant, and in permitting the witness to answer:

A. "I didn't live on it at all."

Twenty-second. In permitting said witness John W. Morgan to testify over the same objection, ruling and exception as follows:

A. "That he only visited the place he thought twice, that Mr. Zachery took him to it once, that he was only there a few hours, that there was furniture there in the cabin, but that he did not know who put them there, that he did not send them there or employ any one to send them there and that the cabin was a small structure made of rough boards, that there was ground cultivated around there but that he did not know who cultivated it, that the land is on the north side of the Company's pasture, that there was a fence on two or three sides of it and connected with other fences, that he didn't know who the other fences belonged to, that he didn't know whether it was before or after the filing that he got the lumber to build his house but that it was about that time, that some months after (witness thought it was after the house was built) he gave them a mortgage and note on the house for \$150 on the house in town,

169 that he thought they got kind of afraid that they were going to lose their money and came to him and wanted a mortgage on the place, that they guessed he was not going to pay, or something that he didn't agree to pay it, that he was to have the \$150 in lumber to go on the homestead, that Mr. Zachery asked him to sign the note and mortgage, said that Mr. Hendricks wanted it and had him go to Mr. Hendricks' office and that he went and gave him a mortgage on the place, that Mr. Hendricks made out the mortgage—thought he made it out after witness got there."

Twenty-third. That said Court erred in refusing and denying the motion of defendant to strike out the testimony of the witness J. W. Morgan made after this.

Upon the ground that said testimony was incompetent, immaterial and hearsay and collateral to the charge against the defendant, and that the claim in question was entirely separate from the Hawk claim under consideration.

Twenty-fourth. In denying the motion of the defendant to strike out the testimony of the witness Henry Neal in relation to the Butte Creek pasture—fencing of the Butte Creek pasture as immaterial, incompetent and collateral and in no way bearing upon the charge that the defendant suborned perjury before the Grand Jury in the matter of the William Hawk claim.

Twenty-fifth. That the Court erred in permitting the witness E. A. Putnam to be asked the question:

Q. "Can you describe to the Jury how this Butte Creek pasture was enclosed, if it was enclosed, in a general way?"

And in overruling defendant's objection thereto, and in permitting said witness to answer the question as follows:

A. "Well, on the East side it is enclosed by a fence that runs down to what they call the West Fork; those places were
170 taken some time ago, that the Company bought and on the West side it is enclosed by the rim rock, and on the north side mostly by rim rock, I think,

Whereupon, the witness, subject to the same objection, ruling and exception, proceeded to testify that the rim rock on the west side was known as the John Day rim rock, that it is a high bluff which runs about parallel with the John Day River that it is almost impossible for cattle or sheep to cross it, that the rim rock on the north was the same, it could be crossed in some places in some it could not, that where it could be crossed there were fences.

Twenty-sixth. In permitting said witness Putnam to be asked the question:

Q. "Was there any Government land inside of this Butte Creek pasture to your knowledge?"

And in overruling defendant's objection thereto, and in permitting said witness to answer:

A. "Yes, sir—to the best of my knowledge about 1800 acres."

Twenty-seventh. In permitting the witness James Loren Combs in relation to his cattle running in the Butte Creek pasture to be questioned:

Q. "What happened to your cattle in the Fall of 1900?"

And in overruling defendant's objection to the same, and in permitting said witness to answer:

A. "Well, some time during the Fall I went in there to gather some of my cattle and while I was in there Mr. Zachery came to me."

And in overruling the objection of the defendant to the succeeding question:

Q. "What did he say?"

And in permitting said witness to answer:

A. "He forbid me riding there alone, he said if I was
171 going to ride alone, I could not run my cattle in there."

And in permitting said witness to be asked, (in relation to the same matter):

Q. "What did Mr. Zachery say then, or what was said then in the presence of Mr. Zachery, by you or Griffith or Zachery?"

And in overruling the defendant's objection thereto, and permitting the witness to answer:

A. "Well, Mr. Griffith asked Mr. Zachery in regard to a cow of his, that I was coming out at the time that I met Mr. Zachery in the pasture and he asked Mr. Zachery about the cow, if he had seen it. Now, I had put Griffith's cow along with what I had of mine, into Jim King's pasture, and when I went to take the cattle out, I didn't find Griffith's cow. I missed her and Griffith asked Mr. Zachery if he had seen the cow since, and Mr. Zachery said he hadn't and in our talk, it was brought up about my riding in there, and taking out cattle, and Mr. Zachery said he would not allow any man to ride in there alone, and if he caught anybody riding in there, he didn't say me, but any one, he would put them out, and Mr. Griffith told him that there was too much Government land in there for him to do that, and he said it didn't make any difference how much Government land there was in there; there was no man that should go in there and ride, if he found them in there riding.

And in permitting the witness Rufus King to testify over the defendant's objection thereto that he had seen Zachery driving the horses of Shephard, Putnam and Scoggins out of said pasture in 1899 or 1900.

Twenty-eighth. In refusing to instruct the jury at the request of the defendant as follows:

"The second count in the indictment charging the defendant with suborning the witness Brown is abandoned by the Government, and upon that charge you should acquit."

Twenty-ninth. In refusing to instruct the jury at the request of the defendant as follows:

"You should not therefore consider these charges of unlawfully obtaining and fencing Government land in any way, except as they may bear (if they do at all) upon the question of whether or not defendant suborned the witness Hawk to testify falsely before the Grand Jury."

Thirtieth. In refusing to instruct the jury at the request of the defendant as follows:

"If Hawk committed the alleged perjury upon his own motion, and if he would have committed it any way, without any inducement on the part of Hendricks, then you cannot find the defendant guilty, whatever he may have said to Hawk."

Thirty-first. That the Court erred in instructing the jury as follows:

In order that you may understand the pertinency of the requirements of the homestead law of the United States, I will state to you some of the principal provisions of that act.

Every person who is the head of a family over the age of 21 and a citizen of the United States, or who has filed his declaration of intention to become such, shall be entitled to enter one quarter section or less of unappropriated public lands to be located in a body in conformity to the legal subdivisions of public lands.

Any person applying to enter land under the homestead section shall first make and subscribe, before the proper officer, and file in the proper land office, an affidavit that he is the head of a family or over the age of twenty-one years and that such application
173 is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person or persons, or corporation, and that he will faithfully and honestly endeavor to comply with the requirements of law as to settlement, residence and cultivation necessary to acquire title to the lands applied for; that he is not acting as agent of any person, corporation or syndicate in making the entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, and that he has not, directly or indirectly, made and will not make any agreement or contract in any way or manner with any person or persons, corporation or syndicate, whatsoever, by which the title which he might

acquire from the Government of the United States should enure in whole or in part to the benefit of any person except himself, and upon filing such affidavit with the register or receiver on payment of the fees he shall thereupon be permitted to enter the amount of land specified.

The Great object of the homestead laws of the United States, gentlemen was to grant land to actual bona fide settlers, persons making settlements upon the public lands for use as homesteads, and to encourage residence upon, cultivation and improvement of public domain. It is generally provided that no certificate shall be given or be issued until the expiration of five years from the date of the entry provided for, and if at the expiration of such time, or any time within two years thereafter the person making such entry proves by two credible witnesses that he has resided upon or cultivated the land for the term of five years immediately succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as specially provided, and that he will bear true allegiance to the Government of the United States, then in such cases he shall be entitled to patent.

174 In respect to the commutation of a homestead, the law provides that a person who avails himself of the benefit of the homestead may pay the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of entry and obtain patent therefor upon making proof at settlement and of residence and of cultivation for such period of fourteen months; but the right of commutation of a homestead depends upon prior compliance with the homestead law in good faith up to the date of commutation.

The law pertaining to homesteads is not complex in its essential requirements.

Now consider what the applicant must swear to when he first files his said application; that he is the head of a family, or over twenty-one years old; that his application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person; that he will faithfully and honestly endeavor to comply with the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for; that he is not acting as agent for any person in making such entry, nor in collusion with any person to give him the benefit of the lands entered; that he does not apply to enter the lands for the purpose of speculation, but in good faith to obtain a home for himself; and that he has not directly or indirectly made, and will not make any agreement or contract in any manner or *manner* with any person or corporation by which the title he may acquire from the Government shall enure, in whole or in part, to the benefit of any one but himself.

Now, when it comes to his final proof the applicant is asked, among other things, when his house was built on the land, and when he established actual residence, and of whom his family consists, and whether the applicant and his family have resided con-

tinuously on the land since first establishing residence thereof,
 175 and for what period or periods he has been absent from the
 homestead since making settlement, and if temporarily absent whether the applicant's family resided upon and cultivated the land during such absence; how much land has been cultivated, as to the character of the land, whether he had sold, mortgaged or conveyed any portion of the land, and other questions appearing in the testimony on the final proof which are intended to elicit proof as to whether the applicant has complied with the laws as a bona fide actual settler.

Good faith, when we speak of it with relation to the public land laws of the United States, means honesty. Good faith is the opposite of bad faith. And whether or not there has been good faith, in for instance the entry of Hawk, is a question for you to determine, considering all the facts and circumstances bearing upon the acts of the homestead applicant to establish a residence as required by the homestead law. There must be a combination of act and intent: the act of occupying and living upon the claim, and the intention of making the same a home to the exclusion of a home elsewhere. Inhabitaney must exist in good faith. I do not regard it as a compliance with the homestead law for a man to file on a tract of land with no intention of making it his home, with no purpose to live there, with no intention of cultivating any part of it, and of acquiring it for a place to reside in. Occasional visits made for a few hours, or for a day or two every six months to a claim taken up as just stated, and made not in good faith but solely for the purpose of attempting to comply technically with the requirements of the law, do not constitute a compliance with the statute.

On the other hand, if a man is really in good faith and means to establish his home, and in good faith settles upon the land and cultivates it, and fixes his home there, the law will sustain him in his application and proof, even though he be absent for not more than six months from such home, such absence being however
 with the intent and in good faith to return to his homestead
 176 and being reasonably necessary to enable him to maintain
 himself and his family, or he would be excused if temporarily absent on account of sickness, or an unavoidable casualty or necessity occurring after he has established his residence upon the land.

The homestead law in forbidding the applicant to make, directly or indirectly, any agreement or contract in any way or manner with any person by which the title to the land acquired from the Government shall enure in whole or in part to the benefit of any person except himself, means by the word "agreement" that there must be a meeting of minds, expressed in some tangible way, and it must be intended in some way to be binding upon the parties. One party may have intended to sell, and the other party may have intended to buy, and yet this would not be enough unless the intention of each was in some way communicated from the one to the other and was understood and agreed to by both.

An agreement, as the word "agreement" is used, need not be in writing. It need not be of sufficient formality, or of a nature to be

enforceable in Court; it is enough if it is proved beyond a reasonable doubt that in some way the minds of the applicant and some other person have met definitely, understandingly; that there is a mutual consent upon their part that when the applicant may acquire title to the land from the United States it shall enure to the benefit of such other person for a consideration; that is, if in truth and in fact the applicant is really to acquire the land for the use and benefit of another, any words, or any acts and words manifesting this mutual consent of the minds of the parties are sufficient to constitute a contract for agreement.

After a settler in good faith has proved up or commuted, if he has complied with the law honestly and in good faith, and has received the certificate or receipt from the receiver of the Land Office, then he has a dominion over the land and he may sell it or dispose of it.

177 And in overruling the objection of the defendant that the same was abstract and misleading to the jury and tended to make the case turn on the proposed good faith of the witness Hawk in making his homestead entry.

Thirty-second. That said Court erred in instructing the jury as follows:

"There is some testimony before you gentlemen, to the effect,—indeed it is not seriously disputed, I take it—that the witness Hawk admitted before the Grand Jury that he had sworn falsely in relation to his homestead application and proof when he first made his statement before them. Any admissions made by Hawk before the Grand Jury that he had wilfully sworn falsely in relation to this matter are to be considered as bearing upon the question of whether or not Hawk did wilfully and knowingly swear falsely before the Grand Jury; that is, they bear upon that ingredient of the offence which I have defined to you to be one of the essential ingredients of the crime of subornation of perjury; and with that limitation they should be considered."

"So a number of the Grand Jurors have testified before you with relation to what occurred before the Grand Jury, what the subject under investigation was. You should consider that as bearing upon the matter that they had before them, and their statements as to what Hawk said by way of a confession are limited to the question of whether or not Hawk did or did not commit perjury before the Grand Jury which, as I have said, is an ingredient, one of the four ingredients, that I have explained to you must exist in order to constitute the crime of subornation of perjury."

Thirty-third. That said Court erred in overruling and refusing defendant's motion to set aside said verdict, and for a
178 new trial therein, and in not allowing said motion.

Thirty-four. That said Court erred in refusing and denying the motion of said defendant to arrest the judgment in said Court upon the ground that the indictment did not charge a crime, and was insufficient and did not sufficiently describe the offence. And did not inform the defendant of the nature and cause of the accusation against him, and was in violation of, and insufficient

under the Sixth Amendment of the Constitution of the United States.

HAMILTON H. HENDRICKS,
Defendant.
ALFRED S. BENNETT,
Attorney for Defendant.

Filed Sept. 28, 1909. G. H. Marsh, Clerk.

179 And afterwards, to wit, on the 28th day of September, 1909, there was duly filed in said Court, a Bond on Writ of Error, in words and figures as follows, to wit:

180 In the Circuit Court of the United States for the District of Oregon.

U. S. OF AMERICA, Plaintiff,
vs.
HAMILTON H. HENDRICKS, Defendant.

Bond.

Know all men by these presents that we, Hamilton H. Hendricks, as Principal and Winlock W. Steiwer, of Fossil, Wheeler County, Oregon and George S. Carpenter of Portland, Multnomah County, Oregon, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of (\$5000.00) Five Thousand dollars, to be paid to the United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 28th day of September, 1909.

Whereas, lately, at the April Term of the Circuit Court of the United States for the District of Oregon, in the suit pending in said Court, between the United States of America, and Hamilton H. Hendricks, a judgment and sentence was rendered against the said Hamilton H. Hendricks, and the said Hamilton H. Hendricks has obtained a Writ of Error from the Supreme Court of the United States, to reverse said judgment and sentence in the aforesaid suit, and a citation directed to the United States of America, to be and appear in the said Supreme Court of the United States, at the City of Washington, in the District of Columbia, sixty days from and after the day of said citation, which has been duly served:

Now, the condition of the above obligation is such, that if
181 the said Hamilton H. Hendricks shall appear either in person, or by attorney in the Supreme Court of the United States, on such day or days as may be appointed for the hearing of said cause, in said Court, and prosecute his Writ of Error; and shall abide by and obey all orders made by the Supreme Court of the United States, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be

affirmed; and if he shall appear for trial in the Circuit Court of the United States for the District of Oregon, on such day or days as may be appointed for the retrial by said Circuit Court, and abide by and obey all orders made by said Court, provided the judgment and sentence against him shall be reversed by the Supreme Court of the United States; then this obligation to be void; otherwise to remain in full force, virtue and effect.

HAMILTON H. HENDRICKS, [SEAL.]
Principal.

WINLOCK W. STEIWER, [SEAL.]
GEORGE S. CARPENTER, [SEAL.]
Sureties.

Signed and sealed in the presence of

G. H. MARSH.
A. M. CANNON.

Signed, sealed and acknowledged this 28th day of September, 1909, before me.

[SEAL.]

G. H. MARSH,
*Clerk United States Circuit Court,
District of Oregon.*

182 UNITED STATES OF AMERICA,
District of Oregon, ss:

I, Winlock W. Steiwer, being duly sworn, depose and say: that I am a resident and freeholder within said district, and that I am worth in property situate therein the sum of Five Thousand Dollars, over and above all my just debts and liabilities, and exclusive of property exempt from execution.

WINLOCK W. STEIWER.

Subscribed and sworn to before me this 28th day of September, 1909.

[SEAL.]

G. H. MARSH,
*Clerk United States Circuit Court,
District of Oregon.*

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, George S. Carpenter, being duly sworn, depose and say: That I am a resident and freeholder within said district, and that I am worth in property situate therein the sum of Five Thousand Dollars, over and above all my just debts and liabilities, and exclusive of property exempt from execution.

GEORGE S. CARPENTER.

Subscribed and sworn to before me this 28th day of September, 1909.

[SEAL.]

G. H. MARSH,
*Clerk United States Circuit Court,
District of Oregon.*

Filed September 28, 1909. G. H. Marsh, Clerk.

183 And afterwards, to wit, on Tuesday, the 28th day of September, 1909, the same being the 146th judicial day of the Regular April, 1909, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge for the District of Oregon, presiding, the following proceedings were had in said cause, to-wit:

184 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

U. S. OF AMERICA, Plaintiff,

vs.

HAMILTON H. HENDRICKS, Defendant.

SEPTEMBER 28, 1909.

At this time comes the defendant, Hamilton H. Hendricks by Alfred S. Bennett, his attorney, and presents to the Court his petition praying for the allowance of a writ of error from the Supreme Court of the United States and the above entitled Court in the above entitled cause, and has submitted therewith his assignment of errors, and his bond for appearance in the sum of Five Thousand dollars (\$5,000.00), (that being the amount of bail hereby fixed by this Court).

Whereupon, it is ordered that said bond be accepted and approved, and that the prayer of said petitioner be granted, and that the Clerk of this Court be, and is hereby directed to issue the writ of error prayed for in said petition, and that sentence and execution in said Court be stayed until the final disposition of said Writ in said Supreme Court of the United States.

Dated this 28th day of September, 1909.

CHAS. E. WOLVERTON, *Judge*.

Filed September 28, 1909. G. H. Marsh, Clerk, by J. W. Marsh, Deputy.

185 And afterwards, to wit, on the 5th day of November, 1909, there was duly filed in said Court, a Motion to amend the record nunc pro tunc, in words and figures as follows, to wit:

186 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

UNITED STATES OF AMERICA

vs.

HAMILTON H. HENDRICKS.

Now comes John McCourt, United States Attorney for the District of Oregon, and shows unto the above entitled Court as follows:

That on the 27th day of July, 1906, the defendant above named was present in the above entitled cause in person and by his attorney, Hon. A. S. Bennett; whereupon the defendant above named was arraigned upon the indictment against him in the above entitled cause; that upon such arraignment the defendant expressly waived the reading of the indictment against him therein and entered a plea of not guilty to said indictment.

That said 27th day of July, 1906, having been theretofore set as the day for the trial of said cause, immediately after entry of said plea of not guilty by the defendant, the trial of said cause was entered upon and the jury selected.

That the Clerk of the above entitled court was present at all said times hereinbefore mentioned and recorded said proceedings and thereafter entered the same in the journal of said court from minutes kept by said Clerk at the time said proceedings occurred.

That thereafter the Clerk of the above entitled court entered in the journal of said court relative to the proceedings in the above entitled cause, occurring upon said 27th day of July, 1906, the following order:

187 "In the Circuit Court of the United States for the District of Oregon.

No. 2908.

"THE UNITED STATES OF AMERICA

vs.

HAMILTON H. HENDRICKS.

Indictment. Section 5393, R. S. U. S.

JULY 27, 1906.

Now, at this day, comes the above named plaintiff by Mr. Wm. C. Bristol, United States Attorney, and Mr. Francis J. Heney, Special Assistant to the Attorney General, and the defendant herein, Hamilton H. Hendricks, in his own proper person and by Mr. A. S. Bennett, of counsel, whereupon this being the day set for the trial of this cause, now come the following named jurors to try the

issues joined, to-wit: M. E. Kandle, William Merchant, H. Johnson, J. E. Jack, Arthur G. Kyrk, Julius Kraemer, F. A. Mangold, Elmer Dixon, Thomas Perry, Cass Gibson, Bedford Laughlin, and Alfred Brownell, twelve good and lawful men of the District, who being accepted by both parties, duly empaneled and sworn, proceed to hear the evidence adduced, and the hour of adjournment having arrived the further trial of this cause is continued until 9:30 A. M. of tomorrow, Saturday, July 28, 1906."

That said Clerk inadvertently omitted to include in said order a record of the arraignment and plea entered by the defendant as aforesaid, but among the minutes kept by the Clerk of said proceedings in the above entitled cause, appears in the handwriting of the Clerk the following memorandum of entry: "Defendant Hendricks arraigned, waived reading indictment and ple-d 'not guilty.'"

That no entry was made by the Clerk in the journal of this court of the arraignment and plea of said defendant, Hamilton H. Hendricks. That upon the 4th day of August, 1906, the
188 jury in the above entitled cause returned a verdict of guilty against the defendant, and thereafter judgment was pronounced upon said verdict.

That the defendant is now prosecuting a writ of error from the Supreme Court of the United States to the above entitled court from said judgment. That the transcript to be filed in the Supreme Court of the United States should contain a record of the arraignment and the entry of a plea by the defendant in said cause.

Wherefore, an order is prayed directing the Clerk to enter in the journal of this court the record of the arraignment of the defendant and the entry of a plea of not guilty by him, in accordance with said minutes and memorandum made by the Clerk at the time said arraignment occurred and said plea was entered, and in accordance with the facts herein, as of the date the same occurred, to-wit, the 27th day of July, 1906.

JOHN McCOURT,
United States Attorney.

Endorsed: Motion Filed Nov. 5, 1909. G. H. Marsh, Clerk U. S. Circuit Court, District of Oregon.

189 And afterwards, to wit, on Tuesday, the 9th day of November, 1909, the same being the 32nd judicial day of the Regular October, 1909, Term of said Court: Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

190 In the Circuit Court of the United States for the District of Oregon.

No. 2908.

THE UNITED STATES OF AMERICA

vs.

HAMILTON H. HENDRICKS.

Indictment. Section 5393, R. S.

NOVEMBER 9, 1909.

Now, at this day, this cause comes on to be heard upon the motion of the plaintiff for leave to amend the record in this cause, nunc pro tunc as of and for July 27, 1906, by inserting in the said record the following words, viz: "Whereupon, said defendant is duly arraigned upon the indictment herein, waives the reading of the same, and for plea thereto says he is not guilty;" said plaintiff appearing by Mr. John McCourt, United States Attorney, and said defendant not appearing either in person or by attorney, although duly served through his attorney with a copy of said motion; and it appearing to the Court that in the minutes of the proceedings of the Court kept by the Clerk on July 27, 1906, under the caption "No. 2908. United States vs. H. H. Hendricks," appear the following words, viz: "Trial. Def't Hendricks arraigned, waives reading indictment, and pleads 'not guilty;'" but that in recording said proceedings upon the journal of said Court, record of the arraignment and plea of said defendant as noted in said minutes was inadvertently omitted; it is, therefore, ordered that said motion be, and the same is hereby, allowed, and that the record in this cause be, and the same is hereby, amended, nunc pro tunc, as of and for July 27, 1906, by inserting in said record the following words viz: "Whereupon, said defendant is duly arraigned upon the indictment herein, waives the reading of the same, and for plea thereto says he is not guilty." Immediately preceding the record on said July 27, 1906, of the empanelling of the jury in said cause.

191 UNITED STATES OF AMERICA.

District of Oregon, ss:

I, G. H. Marsh, Clerk of the Circuit Court of the United States for the District of Oregon, pursuant to the foregoing Writ of Error and in obedience thereto, do hereby certify that the foregoing pages, numbered from five to 190 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of The United States of America, plaintiff and defendant in error, vs. Hamilton H. Hendricks, defendant and plaintiff in error, as the same appear of record and on file at my office and in my custody.

In Testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 12th day of November, A. D. 1909.

[Seal United States Circuit Court, Oregon.]

G. H. MARSH, *Clerk*.

Endorsed on cover: File No. 21,912. Oregon C. C. U. S. Term No. 164. Hamilton H. Hendricks, plaintiff in error, vs. The United States. Filed November 27th, 1909. File No. 21,912.

Supreme Court of The United States

October Term, 1911

No. 164

Hamilton H. Hendricks, Plaintiff in Error,

vs.

The United States

In Error to the Circuit Court of The United States for the
District of Oregon

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

This is a Writ of Error to the Circuit Court of the United States, for the District of Oregon. The questions involved are,

First: The sufficiency of the indictment under the provisions of the sixth amendment to the Constitution of the United States.

Second: Certain rulings of the Court admitting evi-

dence and instructions given and refused in the course of the trial.

That part of the indictment which is important upon this appeal, and the insufficiency of which will be urged, was as follows:

That Hamilton H. Hendricks, late of the County of Wheeler, in the said district, on the fifteenth day of January, in the year of our Lord, nineteen hundred and five, at and within the said County of Wheeler, in the said district, unlawfully did wilfully and corruptly suborn, instigate and procure one George W. Hawk to appear in person before them the said grand jurors, then and from thence hitherto sitting at the city of Portland, in the said district, as a grand jury of the Circuit Court of the said United States for the said district, *and amongst other matters inquiring into certain criminal violations of the laws of the said United States relating to the public lands and the disposal of the same, and the unlawful fencing thereof, which had then lately before been committed within the said district*, and to take his oath before the said grand jury, and upon his oath so taken to testify, depose and swear before the said grand jury in substance and to the effect that *when he, the said George W. Hawk, made his application, dated October 19, 1898, and filed in the land office of the said United States at The Dalles, Oregon, on October 21, 1898, to enter certain public lands known and described as the southeast quarter of the southeast quarter of section two, the east half of the northeast quarter of section eleven, and the southwest quarter of the northwest quarter of*

section twelve, in township seven south and range twenty-two east, reference being had to the Willamette Meridian and base line as a homestead, under the laws of the said United States concerning homesteads, the same was honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that he, the said George W. Hawk, was not acting as agent of any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land so entered, or any part thereof, or the timber thereon; that he was not applying to enter the said lands for the purpose of speculation, but in good faith and to obtain a home for himself; that he had not made, and would not make, any agreement or contract with any person or persons, corporation or syndicate, by which the title which he should acquire from the said United States in the said lands would inure to the benefit of any person except himself; and that he himself paid the fees required by law to be paid upon the filing of such application;—that when he, the said George W. Hawk, *on the second day of March, in the year nineteen hundred*, subscribed and swore to his affidavit and testimony of final proof of settlement upon and cultivation of the said lands, he had therefore, to wit, in the month of April, 1899, commenced his residence on the said lands, and had not sold, conveyed or mortgaged any portion of the said lands; and thereupon the said George W. Hawk, in consequence and by means of the said wilful and corrupt subornation, instigation and procurement of the said Hamilton H. Hendricks, afterwards, to wit, *on the twenty-third day of January, in the year nineteen hundred and five*, in the said district, did appear in person before the said grand jury, at Portland aforesaid, and then and there was in due manner sworn by the foreman thereof, and then and there took his the said George W. Hawk's oath before the said grand jury that he would testify truly, and true answers

make to all questions which should be put to him, before the said grand jury; the said grand jury then and there being a tribunal having due and competent authority to administer the said oath to the said George W. Hawk in that behalf, and the matter in which he was so sworn and took his oath as last aforesaid being then and there a case in which a law of the United States then authorized an oath to be administered; And it then and there, at and upon the taking of the said oath by the said George W. Hawk before the said grand jury as aforesaid, became and was a material question whether, when he so made and filed his said application to enter the said lands as a homestead as aforesaid, the same was honestly and in good faith made for the purpose of actual settlement and cultivation, and whether it was made for the benefit of any other person, persons, or corporations, and whether he the said George W. Hawk was acting as agent of any person, corporation or syndicate in making such entry, and whether it making his said entry he was in collusion with any person, corporation or syndicate to give them the benefit of the land so entered, or any part thereof, or the timber thereon, and whether he was not applying to enter the said lands for the purpose of speculation, rather than in good faith to obtain a home for himself, and whether he had not made, and would not make, an agreement or contract with some person or persons, corporation or syndicate, by which the title which he should acquire from the said United States in the said lands would inure to the benefit of some person except himself, and whether he the said George W. Hawk himself paid the fees aforesaid,—and whether, when he the said George W. Hawk so subscribed and swore to his said affidavit and testimony of final proof of settlement upon and cultivation of the said lands as aforesaid, he had, in the month of April, 1899, or at any time commenced his residence on the said lands, and whether he had sold, conveyed or mortgaged any portion of the said lands

in substantially the same language, and as it was dismissed by the Government at the trial, it may be disregarded for the purpose of this hearing.

The portion of the above indictment which is printed in italics, is the portion bearing upon the question hereinbefore stated, and to which we shall in the argument call the special attention of the Court, it being contended by the plaintiff in error, that the indictment, in order to be sufficient, should have stated *the particular matter* which was being investigated by the grand jury at the time, and to which it was claimed the alleged false testimony was material.

It will be noticed as bearing upon this matter, that the witness Hawk's final proof upon his land, about which he was testifying, and all the proceedings in relation thereto, were on or prior to March 2, 1900, and that this investigation before the grand jury was in January, 1905. So that any crime which Hawk may have committed in relation to the filing upon his land was barred by the Statute of Limitation, and the grand jury had no authority to investigate the same.

It is understood, however, that it is not claimed it had any jurisdiction to investigate the original transaction, but rather that the alleged false testimony became material collaterally in some other later matter, of which the grand jury did have jurisdiction.

Indeed, it was developed on the trial that the particular matter which was under investigation at the time of the alleged perjury was a charge against one John Roll, who was alleged to have unlawfully taken up public land in the year 1904, and any offense in relation to which would therefore have been within the Statute of Limitation and

would not have been barred, and which the grand jury would have had jurisdiction to investigate at the time the indictment was found.

It is claimed on behalf of plaintiff in error that if this testimony was material in reference to any such collateral matter which was before the grand jury, *the collateral matter should have been set forth*, and the indictment should have alleged that it was material in relation to that matter, so that the defendant could have an opportunity to intelligently defend as to the materiality of the alleged evidence as well as to other elements of the offense.

The plaintiff in error contends that he had a constitutional right under the sixth amendment to the Constitution of the United States, to be fully informed "of the nature and cause of the accusation." And that this right could not be taken away by any statute, and that he was not so informed by an indictment which did not in any way show the "case, matter or thing" to which the alleged false testimony was claimed to be material. This question was directly raised as a constitutional question by a motion in arrest of judgment in the court below based upon the ground that the indictment was not sufficient within the constitutional provision already alluded to. (See printed Trans.) p. 17.) The objection to the sufficiency of the indictment was also raised by demurrer, objection to the in-

roduction of evidence and by requested instructions to acquit.

QUESTION AS TO MATERIALITY ALSO RAISED ON THE EVIDENCE.

In the course of the trial it was disclosed that the matter which the grand jury was investigating at the time of the alleged perjury was the alleged wrongful taking up of public lands by one John Roll in 1904, four years or more after the transaction to which the testimony in question apparently relates. It was *claimed* by the District Attorney that this testimony was material in the Roll matter, as tending to show knowledge and motive. But there was not a particle of testimony showing how it was material in the Roll matter, or that there was any connection whatever between the Hawk matters and the Roll matter. The contention of the plaintiff in error in relation to this matter is that the materiality of this testimony to the Roll matter could no be *assumed*, but that *it must be proven* the same as any other fact, and that if it were material for the purpose of showing system or knowledge that materiality could not be assumed, but must be proven by showing some relation between the two transactions and how one bore upon the other. This question was raised by a motion of nonsuit and dismissal, and also by instructions to the jury

which were refused by the court, as will appear more at length in the argument upon this question.

The District Attorney, over the objection of the defendant, was permitted to prove as against this defendant, the confessions of Hawk before the grand jury made after the alleged perjury had been committed, in which Hawk's statement before the grand jury to the effect that his first testimony was false,—that he had not taken up the land in question for his own benefit, but that he had been solicited to do so by the defendant, etc., was permitted to be proven before the jury in this case. It is contended on behalf of the plaintiff in error that such confessions are not competent evidence against the defendant for any purpose whatever.

The District Attorney called as witnesses, certain of the grand jury, who found the indictment against the defendant, who were permitted, over the objection of the defendant, to refresh their memories as to what the witnesses were alleged to have testified to *by the indictment drawn by the District Attorney*, and virtually to testify from that

as to the testimony of such witnesses. This is another error complained of by the plaintiff in error.

The District Attorney, over the objection of the defendant, was permitted to show that the Butte Creek Land and Livestock Company (of which the defendant was a stockholder) had enclosed a large amount (about 18,000 acres, of Government land in a pasture, and had acted arbitrarily in relation thereto,—in not permitting other settlers to turn their stock into the enclosure, etc. This land did not include the Hawk claim referred to in the indictment, and indeed, was in another section of the country, and not coming anywhere within fourteen miles of the Hawk claim, and it was not proven or claimed that the Hawk claim had been included in any pasture. The defendant claims that the only purpose of his testimony was to prejudice the defendant by showing that he had acted arbitrarily and unfairly with other settlers in the matter of fencing the public lands, and thereby holding him up to the execration of the jury. But the District Attorney was permitted to prove this on the theory that it bore in some way upon the alleged motive or system of the defendant.

The district attorney was permitted to go still farther, over the objection of the defendant, and show the arbitrary

actions and words of another stockholder of the Butte Creek Livestock Company in relation to this fencing.

"Whereupon the witness was asked the following question:

Q. What did Mr. Zachary say then, or what was said then in the presence of Mr. Zachary by you or Griffith or Zachary?

To which the defendant objected as incompetent, immaterial and in no way bearing upon the charge against the defendant of suborning Hawk to commit perjury before the grand jury. But the objection was overruled. To which the defendant excepted and his exception was allowed.

And the witness answered:

A. Well, Mr. Griffith asked Mr. Zachary in regard to a cow of his, that I was coming out at the time that I met Mr. Zachary in the pasture, and he asked Mr. Zachary about the cow, if he had seen it. Now, I had put Griffith's cow along with what I had of mine, into Jim King's pasture, and when I went to take the cattle out, I didn't find Griffith's cow. I missed her and Griffith asked Mr. Zachary if he had seen the cow since, and Mr. Zachary said he hadn't and in our talk, it was brought up about my riding in there, and taking out cattle, and Mr. Zachary said he would not allow any man to ride in there alone, and if he caught anybody riding in there, he didn't say me, but anyone, he would put them out, and Mr. Griffith told him that there was too much Government land in there for him to do it, and he said it didn't make any difference how much Government land there was in there: there was no man that should go in there and ride, if he found them in there riding."

There was much other testimony along the same line, but this is illustrative of all upon this question.

SPECIFICATION OF ERRORS.

Plaintiff in error specifies the following errors upon which he will rely, and which he intends to urge upon the hearing of this cause:

First: That the court erred in refusing and denying the motion of the defendant to arrest the judgment in said cause upon the ground that the indictment did not charge a crime, and was insufficient, and did not sufficiently describe the offense, and *did not inform the defendant of the nature and cause of the accusation against him, and was in violation of, and insufficient under the sixth amendment in violation of, and insufficient under the sixth amendment of the Constitution of the United States.*

Second: That the said court erred in overruling the demurrer of the defendant to the indictment in said action.

Third: That the court erred in overruling the objection of the defendant to the introduction of any and all testimony in said cause, upon the ground that the indictment did not set forth sufficient facts to constitute a crime.

Fourth: In overruling the motion of the defendant at the close of the Government's case, to withdraw the case from the jury, and to dismiss and nonsuit the same, upon the ground that there was no sufficient evidence of the materiality of the statement charged in the indictment to have been made falsely, and in not allowing said motion and in denying and refusing the same.

Fifth: In refusing to instruct the jury as follows: "Before you could find the defendant guilty on this charge, it must be proven that the alleged false testimony was material to some investigation before the grand jury, and there is no evidence that it was so material, and you should acquit."

Sixth: In refusing to charge the jury that "If there was any crime committed by Hawk or the defendant in the matter of filing on his claim, or making final proof upon the same, as shown by the evidence, it was outlawed and could not be prosecuted at the time defendant is charged with having committed this crime."

Seventh: That the court erred in permitting the witness A. Bettinger to be asked the following question:

"Did he make any other statement afterwards?"

And in overruling the defendant's objection hereto on the ground that said statement was post-dating the alleged perjury, and self serving in its character, and incompetent as against the defendant in this case, and not binding upon the defendant; and in permitting said witness to answer said question as follows:

A. "He made another statement afterwards." The sweat commenced to pour down his cheek and he made a statement again afterwards—well, after the first statement, then he said I am willing—he walked the floor—he made a few steps and said "Well I will tell the Grand Jurymen the truth," he says, and he said "I was taking this land up for somebody else, and he said first he was taking it all up for himself, and when he told the truth he said it was for somebody else."

Ninth: In permitting said witness Bettinger to be asked the following:

Q. "Before he told the truth did he say whether or not he had made any contract to sell the land before making final proof? Did he claim he was making final proof on the land for himself or had made an agreement to sell it?"

In overruling the objection thereto and permitting said witness to answer said question as follows:

A. "I am not sure about that, but it seems to me that he had a contract as I remember right, he had a contract that the land was going over to another party."

In permitting said witness Bettinger to be asked the following question:

Q. "Do you remember whom he had offered to sell it to?"

And in overruling the defendant's objection hereto and in permitting said witness to answer as follows:

A. "It seems to me like Hendricks."

Ninth. In permitting said witness Bettinger to refresh his memory from the indictment as to the testimony of Clyde Brown in response to the following question and statement of counsel for Government:

Q. "I will ask you to read the alleged indictment in this case which is now handed you, that portion of it relating to subornation of Clyde Brown for the purpose of refreshing your recollection in regard to what it was that Clyde Brown testified to before the Grand Jury which became the basis of this indictment for him—his subornation—it begins at 2."

And in overruling the defendant's objection to witness refreshing his memory from the indictment on the ground that there was no proper foundation laid, that it had not been shown to be a paper proper for him to refresh his memory from, or drawn by him, or under his direction, or at a time when the facts were fresh in his memory; and in permitting the witness after refreshing his memory from said paper to testify as follows:

Q. "Did you know the contents of that indictment at the time it was turned into Court? You went with the Grand Jury at the time you turned it into Court?"

A. "Yes, sir."

Q. "Did you know its contents then?"

A. "We didn't read it over, every one of these then, at the time—maybe the Grand Jury did—we know the substance of it."

Q. "Did you know what the substance in there was as regards what Clyde Brown had testified to?"

A. "Yes, sir. Certainly."

Q. "And did it correctly state the substance at the time; did you believe it correctly stated—the substance of what Clyde Brown had testified to?"

A. "Of course."

Q. "And you still believe it?"

Q. "And you can say from that, after reading it, have you—can you recollect after reading that?"

A. "I know more about it now, of course." And was asked the following question:

Q. "Can you give in substance as to what Clyde Brown testified to?"

A. "He testified to just about the same that Hawk did and that he had built fences and built a house and taken it up for himself, and afterwards he testified—he just reversed the thing."

Tenth: In permitting said witness Wade to be then asked the following question:

Q. "Go on and tell what he said now."

In overruling the defendant's objection thereto as before and in permitting said witness to answer:

A. "Well, he says, as far as my memory serves me, I won't say it was in just these words—he says it is no use of my trying to deceive you men any longer. He says, I have been trying to deceive you but I see it is no use, or something to that effect; that is the sum and substance as well as I remember."

Eleventh: In permitting said witness in the same connection and over the same objection, to be questioned, and answer as follows:

Q. "Then what did he tell you as being the fact?"

A. "Well, I can't give—can't remember the words that he used, but it was that he had taken it up for some other, but that he had been induced or influenced by other parties to take up the land."

Q. "Do you know who the parties were who he said he was taking it up for?"

A. "I don't know—I can't—I don't bear in mind just now—that is who the parties were—whether it was for—

Q. "Do you remember who he said the land was to go to?"

A. "No. I don't just call to mind at present just what statement he made to that."

Q. "Do you remember any parties it was to go to?"

A. "To this company."

Twelfth: In permitting witness F. G. Buffum to be asked the following question:

Q. "Now do you remember what he said afterwards as to taking up the homestead? After he had commenced—after he had made his statement that he was going to tell the truth?"

And in overruling the defendant's objection that is was incompetent immaterial and in no way binding upon the defendant and hearsay, and in permitting said witness to answer:

A. "He said he was approached up there in regard to taking a homestead, that he file on it, and that all the expenses were paid by the Butte Creek Company, and I forget the amount of money he was to receive, but I think it was \$300 when the final proof was issued."

Thirteenth: In permitting the witness John W. Morgan to be asked the following question(referring to a talk with Mr. Zachary.,

Q. "And what was that talk?"

And in overruling the defendant's objection to the same upon the ground that it did not appear that at the time this talk with Mr. Zachary was had that he was in any position to bind the defendant and was not even a member of the Company of which Mr. Hen-

dricks was a member, and in permitting said witness to answer:

A. "Why, he asked me to take up the homestead and asked me if I wanted to take up a claim, and I told him I would, and went and filed on a claim, that is all."

And in permitting the said witness to be asked and to answer the following question in the same connection and over the same objection.

Q. "Was that all?"

A. "Well, I was to receive \$300 for the claim."

Q. "Did he tell you that?"

A. "Yes, sir."

Q. "Did he give you any money then?"

A. "Not then, no."

Q. "Did he at any time after?"

A. "No, Zachary never gave me any money."

Q. "Did anybody give you any money?"

A. "Yes, sir."

Q. "Who?"

A. "Well, I got out of Steiwer's and Carpenter's store. Mr. Carpenter handed me \$200."

Q. "How long after you filed?"

A. "Oh, I don't know; it was a few months, I guess, a month or two, I don't know it might have been more."

Q. "Now what became of the first homestead claim?"

A. "I relinquished it."

Q. "Where was that located?"

A. "I don't know, I never saw it."

Q. "You never saw it?"

A. "No."

Q. "Did Zachary tell you where it was at the time you filed?"

A. "I don't think so."

Q. "Did he tell you it was any way near the land he had anything to do with?"

A. "He didn't say."

Q. "Now then, at the time you filed the second homestead filing did you have any talk with anybody before you made the filing?"

A. "Yes, sir, I had a talk with Mr. Zachary."

Q. "With Mr. Zachary?"

A. "Yes, sir."

Q. "Can't Zachary?"

A. "Yes, sir."

Q. "What did he say to you about it?"

A. "Of course,—***

Q. "What did he say?"

A. "He asked me if I wanted to take up a—he wanted to know if I wanted to take up a homestead for him and I asked him what I was going to get for it, and he told me what I would get when I had taken up the claim."

Q. "What did he tell you he would do?"

A. "He told me he would give me \$150 worth of lumber, and when I had proved up on the claim he would give me \$150 in addition to that."

Fourteenth: In permitting said witness Putnam to be asked the question:

Q. "Was there any Government land inside of this Butte Creek pasture to your knowledge?"

And in overruling defendant's objection thereto, and in permitting said witness to answer:

A. "Yes, sir—to the best of my knowledge about 18,000 acres."

Fifteenth: In permitting the witness James Loren Combs in relation to his cattle running in the Butte Creek pasture to be questioned:

Q. "What happened to your cattle in the Fall of 1900?"

And in overruling defendant's objection to the same, and in permitting said witness to answer:

A. "Well, some time during the Fall I went in

ARGUMENT.

THE CONSTITUTIONAL QUESTION:

The sixth amendment to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, *and to be informed of the nature and cause of the accusation*; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

That the provisions of this section give to defendants in criminal cases important constitutional rights of which the courts will not permit them to be deprived, and that a substantial and serious failure to comply with its terms raises a constitutional question which the defendant may invoke as such, and which cannot be taken away by any act of legislature seems to be too well settled to admit of question.

U. S. vs. Cruschshank 92 U. S. 542 *sc* 23 Co Law 593.

State vs. Weber, *Vermont*, 62 At. 1018.

Hogue vs. U. S. (C. C. A. 5th Circuit) 184 Fed. 248.

State vs. Pettye, 84 Fed. 891.

State vs. Silverberg, 78 Miss. 858.

Moline vs. State, *Neb.* ... 93 N. W. 228.

State vs. Mace, 76 Me. 66.

McLaughlin vs. State, 45 Ind. 343.

McNair vs People, 89 Ill. 444.

Reyes vs. State ... *Fla.* ... 15 Southern Rep. 876.

First Bishop's New Criminal Proceedure, Sec. 104, 108 and 110.

Rosen vs. U. S. 161, *U. S.* 31, 40, *Co Law* 607.

Turnbull vs. U. S. 46, *Fed* 755.

U. S. vs. Potter, 56 *Fed.* 83.

In *United States vs. Cruikshank*, 92 *U. S.* 542, *S. C.*;
23 *Co-op. Law*, 593, it is said:

"In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend VI. In *United States vs. Mills*, 7 *Pet.* 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty.'"

In the opinion of Mr. Justice Harlan, in *Rosen vs. United States*, 161 *U. S.* 31; 40 *Co-op. Law*, 607, it is said:

"The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense; * * *"

And in the dissenting opinion of Mr. Justice White concurred in by Mr. Justice Shiras, it is said:

"Mr. Justice Shiras and myself are unable to concur in the opinion and judgment of the court. Thinking, as we do, that the consequence of the affirmance of the judgment is to deprive the accused of rights guaranteed to him under the Constitution of the United States, we are impelled to state for our dissent."

In *State vs. Weber*, cited above, it is said:

"The respondent insists that the indictment here and the form prescribed by the statute are insufficient to meet the requirements of the Constitution, and that therefore the Legislature had no authority to estab-

lish its sufficiency. The Legislature may simplify and mold the form of indictments at pleasure, provided in so doing it does not contravene the constitutional provisions and leaves enough to meet the constitutional requirements. *State vs. Comstock*, 27 Vt. 553. But this power of the Legislature is thus limited, and if, as claimed by the respondent, this indictment does not sufficiently apprise him of the cause and nature of the accusation brought against him, as required by article 10 of the Constitution of the state, it is fatally defective, notwithstanding the Legislature has declared that such an indictment shall be sufficient. Is it necessary then, in order to meet this requirement and to sufficiently inform this respondent of the cause and nature of the charge, to specify the matter then under consideration by the grand jury? We think it is. The highest degree of certainty is not required, but the charge must be set forth with such accuracy of circumstances as will apprise him with reasonable certainty of the nature and cause of the same, that he may intelligently prepare to meet it, and, if convicted, successfully plead his conviction in a subsequent prosecution therefor. This must not be left to conjecture or inference. It must appear by positive averment. In no other way can a respondent get the full benefit of this salutary provision of the Constitution."

In *Trumbull vs. United States*, 46 Fed. 755, it is said:

"In prosecution for offenses against the laws of the United States, an indictment in which the charging part follows the language of the statute upon which it is founded is not sufficient, unless such words indicate the acts constituting the offense. Every defendant in a criminal case has a constitutional right to be informed by the indictment of the nature and cause of the accusation against him, and the cause must be stated with such particularity as to indicate clearly the facts to be proven on the trial."

In *United States vs. Potter*, 56 Federal, 83, it is said:

"In order to properly inform the accused of the

'nature and cause of the accusation,' within the meaning of the constitution and of the rules of the common law, a little thought will make it plain, not only to the legal, but to all other educated minds, that not only must all the elements of the offense be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive sufficient information to enable him to reasonably understand, not only the nature of the offense, but the particular act or acts touching which he must be prepared with his proof; and when his liberty, and perhaps his life, are at stake, he is not to be left so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts with the hazzard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as surprise can be avoided by reasonable particularity and fulness of description of the alleged offense."

In *Hogue vs. United States*, 184 Federal, 248, it is said by the Circuit Court of Appeals:

"We have another statute, not confined to perjury, which provides that no indictment shall be deemed insufficient because of any defect in matter of form, but it does not seek to dispense with matters of substance. Rev. St. 1025 (Z. S. Comp. St. 1901, p. 720.) It remains a fundamental requirement that the substance of the crime sought to be charged must be stated in the indictment, and so stated that the defendant, from the allegations of the indictment, may understand what he is called upon to defend. *This is a constitutional requirement.* Const. Amend. 6.

Almost the same language is used by Judge Hammond in the case of *State vs. Pettys*, 84th Federal, 891.

In *State vs. Silverberg*, 78 Miss. 858, the Mississippi Constiution has a provision identical with the Sixth Amendment to the Constitution of the United States, and the Court says:

"The code provides that an indictment for perjury shall set forth the substance of the offense charged. This statute which is substantially a copy of the 23d George II, Chap. 11, did not intend to dispense with the necessity of setting out in an indictment for perjury the substance of the issue or point of inquiry in the cause in which the perjury is alleged to have been committed, *and if it had done so in express terms, it would have been in violation of the bill of rights which secures to the defendant charged with crime the right "to demand the nature and cause of the accusation."* The point of enquiry should have been stated. The proceeding should be identified by charging the legal name, as for example that it was a trial for murder, or an action of ejectment, and the matter in issue must be averred with sufficient clearness to inform the person accused of perjury of the exact nature of the charge against him."

In *Moline vs. State*, — Neb. —, 93 N. W., 228, it is said.

"It is asserted that the defendant has not had the opportunity of being confronted with an information disclosing the "nature and cause of accusation" against him, and a copy of such information furnished, as is guaranteed to him by the Constitution. The object of the Constitution guaranty is doubtless for the purpose of having the accused informed of the precise offence for which he must answer, and thus enable him to defend against that particular accusation when judicially called upon to do so."

And it was held that under this constitutional provision the particular indictment in question in that case was bad.

In *State vs. Mace*, 76 Maine, 66, the case was a perjury case, and the court said:

True, the form followed in this case, is one established by legislative authority. But the authority of the legislature in such cases is limited. Undoubtedly the legislature may abbreviate, simplify, and in many other respects modify and change the forms of indictments; but it cannot make valid and sufficient an indictment in which the accusation is not set forth with sufficient fullness to enable the accused to know with reasonable certainty what the matter of fact is which he has got to meet, and enable the court to see, without going out of the record, that a crime has been committed. This the constitution of the state forbids: and to that instrument, the legislature as well as all other tribunals, must conform. The authority of the legislature in this particular, and the extent to which it may go in establishing forms, has been judicially determined in this state, and the arguments, pro and con, need not be repeated here."

In *McLaughlin vs. State*, 45 Indiana, 343, the Court says:

"There is no country, we presume, where the principles of the common law prevail, and the liberty of the citizen is respected, where the state is not required, in bringing an alleged criminal into court to answer a crime, to prefer against him, in the form of an affidavit, information, or indictment, a specific accusation of the crime charged. It is accordingly provided in the constitution of the State, Sec. 13, Art. I: 'In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.' The accused has a

right to demand the nature and cause of the accusation against him, and to have a copy thereof. The accusation must be in writing. This is necessarily implied from the fact that the accused has a right to have a copy thereof. 'The nature and cause of the accusation' must be stated. The constitutional guaranties, which we have just quoted, are of the utmost importance to a person accused of crime, and a disregard of them, or any of them, even in a prosecution designed to suppress a traffic so full of evil as that of retailing intoxicating liquors, can not be tolerated with any regard to the proper and safe administration of the criminal laws.

The principal objects in requiring a reasonable degree of particularity in charging an offence are * * *

Fourth: *To enable the defendant to prepare for his defence*, in particular cases, and to plead in all, or, if he prefer it, to submit to the court, by demurrer or motion to quash, whether the facts alleged, supposing them to be true, so support the conclusion of law, as to render it necessary for him to make any answer to the charge. Fifth: Finally and chiefly, to enable the court, looking at the record after conviction, to decide whether the facts charged are sufficient to support a conviction of the particular crime, * * *

In *McNair vs. People*, 89 Illinois, 444, the Court says:

"The accused should be appraised of the nature and cause of the accusation. *This is a right secured to him by the constitution.*"

In *Reyes vs. State*, —Florida, —, 15 Southern Rep. 876, the Court says:

"In arriving at our conclusions herein, we have not overlooked the provisions of our statute, (Section 2892, Rev. St.) Which provides 'That every indictment shall be deemed and adjudged good which charges the crime substantially in the language of the statute.' It could not have been the intention of the statute that an indictment would be sufficient which

gave a defendant no information of the charge against him sufficient to enable him to prepare his defence. Such a construction put upon it would be *in conflict with the eleventh section of the bill of rights of our constitution*, which provides that every person accused of crime 'shall be heard * * * to demand the nature and cause of the accusation against him.' "

In Bishop's New Criminal Procedure, sections 104 to 110, the effect of this constitutional provision upon the rights of the defendant, and his constitutional right thereunder are discussed at length, the learned author discussing the provision of the Mississippi constitution which as we have seen is identical with that of the Sixth Amendment, says:

"It 'was intended,' said Yerger, J., 'to secure to the accused such a specific designation of the offence * * * as would enable him to make every preparation for his trial necessary to his full and complete defence'."

And again:

"Standing beside the presumption that the defendant is innocent, they have compelled from the prosecuting power such a statement of the nature and cause of the accusation as would impart to him, who is supposed to know nothing of it outside of the written words, reasonable information of what he is to encounter at the trial; thus enabling him to collect his proofs, and avoid the injury of a surprise."

It might, and probably will be, contended that this indictment is sufficient under certain sections of the revised statutes. We do not believe that these sections of the statute were intended to take away any of the substantial rights of the defendant, or to make it less obligatory upon the state to set forth every essential element of the alleged offence in any particular case, so that the defendant may have an opportunity to prepare his defence, and know

just what he had to meet as to that particular essential. But if there was such intention then the act is in conflict with the Constitution and so far void.

This being an indictment for perjury, it will not be denied that the materiality of the alleged false testimony was an essential element and went to the very gist of the offence.

The defendant surely had a right to know in advance to what particular investigation it was claimed that the alleged false testimony was material, so that he could prepare his defence and be in a position to meet the contention of the state and show, if he could, that the matter in question was absolutely immaterial to the matter which was under investigation. This he might do by evidence or if (as we have contended in this case) the alleged false testimony was of such a character, that it could not be material to the matter being investigated by the grand jury, the defendant might have an opportunity to raise the question by demurrer or in any other suitable way.

In this case it was claimed at the trial that the testimony was material to the investigation of the homestead claim of one, John Roll. *But there was not a word in the indictment to indicate that any such contention would be made*, and the defendant actually had no notice whatever that the Roll matter was under investigation at the time of the alleged false testimony, or that the testimony was claimed to be material as to that matter, until it was sprung

upon him at the trial when he had to meet it as best he could without any opportunity to prepare either as to the facts or as to the law, which would control the question. *We submit to this Honorable Court that the defendant was not accorded his constitutional right to know in advance "the nature and cause of the accusation against him."*

It has always been held that the particular proceeding in which the alleged false testimony is claimed to have been given and to which the alleged false testimony is claimed to be material must be set forth in the indictment, whether the alleged perjury was committed before a grand jury or before any other tribunal.

- Commonwealth vs. Taylor*, 96 Ky. 394; 29 S. W. 138.
State vs. Weber, 78 Vt. 463; 62 At. 1018.
State vs. McCormick, 52 Ind. 169.
Banks vs. State, 78 Ala. 14.
State vs. Wiggin, (Miss.) 30 So. 712.
Buller vs. State, 33 Texas Criminal Rep. 551.
Commonwealth vs. Pickering, 8 Grattan 628; 56 Am. Dec. 158.
State vs. Koslowski, 228 Mo. 351; 128 S. W. 740.
State vs. Ayer, 40 Kans. 43; 19 Pac. 403.
State vs. Silverberg, 78 Miss. 858; 29 So. 761.
State vs. McCone, 59 Vt. 117; 7 At. 407.
State vs. See, 4 Wash. 344.
Wilson vs. State 115 Ga. 206; 41 S. E. 696.
State vs. Ela, 91 Me. 309; 39 At. 1001.
Davis vs. State, 79 Ala. 20.
United States vs. Wilcox, 4 Blatchford, 391 28 Fed. cases 16692.

Hope vs. U. S. 184 Fed. 245.

State vs. Smith, 40 Kans. 631.

U. S. vs. Robinson (Dak.) 23 N. W. 90.

Brooks vs. State, 29 Tex. Appeals.

Weaver vs. State, 34 Texas Criminal Rep.

In *Commonwealth vs. Taylor*, 96 Ky. 394; 29 S. W. 138, the Court says:

"The indictment was defective because it did not explicitly describe the 'matter' which was being investigated by the grand jury, about which the defendant was testifying when he gave the evidence which is charged to be false. This should have been done, to have fully appraised him of the nature of the charge against him, and that the court might be enabled to determine whether or not the grand jury had authority to make such investigation, and through its foreman administer the oath. The charge is that the false evidence consisted in defendant saying he did not know Dan Millikin, and inferentially stating that the purpose of the grand jury was to ascertain if he had seen Dan Milliken gaming. The indictment should have charged that the matter under investigation was the charge of gaming against Dan Millikin. For the foregoing reasons, the demurrer to the indictment was properly sustained."

In *State vs. Weber*, 78 Vt. 463, 62 At. 1018, the Court says:

"It is further urged that the indictment is fatally defective because neither count specified the subject-matter of the investigation then being pursued by the grand jury. * * *

"Is it necessary, then, in order to meet this requirement and to sufficiently inform this respondent of the cause and nature of the charge to specify the matter then under consideration by the grand jury? We think it is. The highest degree of certainty is not required, but the charge must be set forth with such

accuracy of circumstances as will apprise him with reasonable certainty of the nature of the same, that he may intelligently prepare to meet it, and, if convicted, successfully plead his conviction in a subsequent prosecution therefor. This must not be left to conjecture or inference. It must appear by positive averment. In no other way can a respondent get the full benefit of this salutary provision of the Constitution."

In *State vs. McCormick*, 57 Ind. 169, it is said:

"We are of the opinion that the indictment is bad, for the reason that there is no allegation of any matter which became material in the investigation before the grand jury. The statute already cited requires, in order to constitute perjury, that the false swearing shall be "touching a matter material to the point in question." It is not alleged that any point was in question. The averment is, that certain questions were asked the defendant, and it is alleged that the questions were material and proper."

In *State vs. Wiggin*, 30 So. 712, the Supreme Court of Mississippi says in the syllabus:

"An indictment against defendant alleged that, as a witness before the grand jury, he took an oath to tell the truth, and, on being so sworn, it became and was a material question where he got certain beer on a certain date, and that he unlawfully and falsely swore that he got it from a certain party, who gave it to him, when in truth such party did not give him the beer, wherefore he was charged with perjury. Held, that as the indictment failed to charge that any offense had been committed by any one which the grand jury was inquiring into, or that any offense was committed by any one in connection with such beer, whereby the investigation of such defendant became material, it was insufficient as charging any offense."

In *Banks vs. State*, 78 Ala. 14, the Court says:

"The indictment is fatally defective in that it fails

to show or indicate any person of whose guilt the grand jury were inquiring. And it fails to designate or point to any place where the act of giving defendant any intoxicating liquors would be unlawful, as the scene of imputed act. It therefore fails to show that the question to the witness was material, but, on the contrary, shows it was *prima facie* immaterial. An answer to an immaterial question cannot be the subject of perjury and an indictment which shows upon its face that the act sought to be proved was immaterial and harmless, as not pointed to some act of imputed criminality, by some person, must be adjudged insufficient. The averment that the matter sworn to was material, cannot overcome the intendment that the matter specified as sworn to was *prima facie* immaterial."

In *State vs. Koslowski*, 228 Mo. 351; 128 S. W. 740, the court says:

"In a prosecution for perjury it is essential to correctly describe the judicial proceeding in which the perjury is alleged to have been committed, and it must be proved substantially as laid."

In *State vs. Silverberg*, 78 Mississippi, 858; 29 So. 761, the Court says:

"This statute, which is a substantial copy of 23 Geo. II. c. 11, did not intend to dispense with the necessity of setting out in an indictment for perjury the substance of the issue or point of inquiry in the cause in which the perjury is alleged to have been committed; and, if it had done so in express terms, it would have been in violation of that clause of section 26 of the bill of rights which secures to the defendant charged with crime, the right 'to demand the nature and cause of the accusation.'"

In *Wilson vs. State*, 115 Ga. 206; 41 S. E. 696, it is said:

"In a prosecution for perjury, it is essential to

lary. The owner of the property upon whose property the crime was perpetrated, should at least be specified."

In *United States vs. Wilcox*, 4th Blatchford 39; 28 Federal cases 16, 692, it is said:

"It was also objected, upon the argument of the demurrer, that the indictment does not show that the proceeding before the commissioner was one in which an oath was required, so as to bring the case within the 13th section of the act of March 3, 1825 (4 Stat. 118), on which the indictment is founded. In this respect, also, the indictment is bad. It is not enough to allege that the persons named were charged with a crime or offense against a law of the United States, for that is a conclusion of law, but the particular charge should be stated. The act of congress, before referred to, does not dispense with this statement."

In *United States vs. Robinson*, 23 N. W. 90, it is said by the Supreme Court of Dakota:

"The subject of the inquiry should be set forth distinctly and directly, to enable the court to know whether the matter deposed by the defendant was material and pertinent to the issue. Perjury cannot be assigned as respects matter which is immaterial to the issue or not in a judicial proceeding. * * * *

"In an indictment for subornation of perjury the same rules apply and the same allegations are necessary as in perjury."

In this case it is plain that these just principles so necessary to an intelligent preparation for defense upon the part of the defendant were utterly disregarded. The only allegation in the indictment as to the matter under investigation before the grand jury at the time of the alleged false testimony, and the only allegation as to the point or issue to which the defendant's testimony is claimed to be material is that the grand jury "amongst other

matters inquiring into *certain* criminal violations of the laws of the United States *relating to the public land and the disposal of the same*, and the *unlawful fencing thereof*, which had then lately been committed within the said district."

No particular person is named. No particular violation of the law as to the disposal of the public lands is named, and no particular tract unlawfully disposed of. Neither is any particular unlawful enclosure in any way indicated.

It is obvious that the indictment gave the defendant no notice whatever as to the particular matter to which it was claimed the alleged false testimony was material. The transaction which the grand jury was investigating might have occurred anywhere within the district of Oregon, which covers an area 350 miles long by 250 miles wide. The person charged with crime, and being investigated might have been any one of the population of that entire district, and the offense itself which was before the grand jury may have been any one of a hundred possible violations of the public land laws.

It may have been false swearing as to a homestead claim, under the revised statutes, section 2281, or as to a timber claim, section 2294, or as to some officer having received greater sums than legal fees in land matters, under the same section, or as to an agreement not to buy at a sale of public lands, under 2373, or for interrupting a survey of the public land, under section 2412, or for an unlawful enclosure or an unlawful assertion of right to public lands, under section 1, of the act of February 25, 1885, or for obstruction of settlement or obstruction of transit over the public lands, under section 3, of the same act, or for cutting live oak or red cedar timber on public lands,

under revised statutes, section 2461, or for cutting other timber, under the act of June, 1878, or for setting out fires on the public land, under the act of February 24, 1897, or for trespass on the public lands, under section 5388, or for conspiracy to defraud the United States as to public lands under section 5440, which has lately so often been invoked by the government.

The allegation in an indictment would be just as enlightening if it should state that an alleged perjury was committed in the investigation "of divers murders, robberies, assaults, libels, etc., then lately committed in the district" Or in the language of Judge Bishop already quoted "to take, in the quicksand of uncertainty, one more turn and sink." If it had alleged broadly that the grand jury were engaged in investigating "into certain violations of the laws of the United States."

Are not such allegations a mockery of the right of the defendant to have the nature and cause of the accusation fully presented to him so that he may have an opportunity to prepare his defense against every essential element of the alleged crime, which has been so carefully and painstakingly protected by the constitutional amendment.

The materiality of the alleged false testimony was one of the essential elements of the offence. Without it there could be no crime. The defendant had an inherent as well as a constitutional right to a fair opportunity to meet and resist that essential element of the offence and to have notice in advance so that he could do so.

In *United States vs. Mann*, 5th Otto, 580; 24 Co-Op. L. 531, it is said:

"Offenses created by statute as well as offenses at common law consist, with rare exceptions, of more than one ingredient; and the rule is universal, that every ingredient of which the offense is composed must be accurately and clearly expressed in the indictment or information, or the pleading will be held bad on demurrer."

How was the defendant then to know what one, of all the possible hundred thousand violations of the "land laws" and "fencing laws" and "other laws" the grand jury were investigating, and to which it was claimed the false testimony of Hawk was material.

At the trial it was developed by the district attorney that the grand jury were at the time investigating the taking of a homestead claim by one John Roll in 1904, four years after the Hawk claim had been finally proved up upon, and it was claimed that Hawk's testimony was material to that investigation, as tending to show collateral knowledge, system, etc. Printed Transcript p. 31.

But the indictment did not disclose any such claim in any way. Roll's name was not mentioned therein, nor was the land taken by him in any way alluded to. There was nothing whatever in the indictment to indicate to the defendant that it was or would be claimed that the alleged false testimony was material to the Roll matter. He knew

nothing of that until it was sprung upon him at the last stages of the trial, two hundred miles from his home and from the place where the principal occurrences had taken place. What chance had he to meet the issue as to the materiality of this alleged false testimony to the Roll matter. He had a right to show, if he could, that there was absolutely no relation between the Hawk matter and the Roll matter, and therefore that the testimony as to the Hawk transaction was entirely immaterial to that matter, or to anything which they were investigating, or that they had a right to investigate. He had a right to notice, by the indictment that it was the Roll matter to which it was claimed that the Hawk testimony was material, so that he could have an opportunity to prepare his defense.

It was far more necessary that the issue or matter being investigated should be set forth in this case, where it was claimed that the testimony was not directly but only collaterally material than it would have been in the ordinary case. Because in the ordinary case the very nature of the testimony may give the defendant a chance to infer that it related and was material to some particular matter, which the tribunal in question were lawfully investigating. But here who could suppose or infer or reason step by step to the conclusion that it was or would be claimed that the testimony of Hawk in relation to *his* claim was material as to the investigation of the John Roll claim for other land miles away and in no way connected?

Here it is conceded that the grand jury had no juris-

diction or authority to investigate the Hawk matter as an independent and principal transaction for the purpose of indicting as to any crime which might be, or might be supposed to be, involved therein. That transaction was, as an independent transaction, a sealed book which the grand jury had no authority to open, except perhaps for the purpose of throwing light on some collateral matter. The last event in the Hawk matter had occurred more than five years before the investigation before the grand jury, and of course was entirely barred by the statute of limitations. It goes without saying that the grand jury had no more authority to inquire into these matters, as an independent transaction, than it would have had to go back ten, fifty or a hundred years.

Indeed, it has never been contended in this case, and we presume it will not be, that the grand jury had any power or authority to investigate alleged crimes back of the statute of limitations, except as such transactions might be collateral to other offences which were within their jurisdiction.

In *United States vs. Hill*, First Brock, 156, 26 Federal cases number 15,364, Chief Justice Marshall, sitting as Circuit Justice, says:

"Grand juries are accessaries to the criminal jurisdiction of a court, and they have power to act, and are bound to act, so far as they can aid that jurisdiction. Thus far, the power is implied, and is as legitimate as if expressly given. To suppose the powers of a grand jury, created, not by express statute, but by the necessity of their aiding the jurisdiction of a court to transcend that jurisdiction, would be to consider grand juries once convened, to be clothed with powers not conferred by law, but originating with themselves. This has never been imagined. It follows then, that,

in the general, the grand juries which are summoned to attend the courts of the United States, possess powers and duties co-extensive with the jurisdiction of the courts which they attend."

And again:

"The power, then, of enquiring into offences of which this court has no jurisdiction, is no more given by implication than by express words. It follows, that the presentment in this case, was not within the oath, or the power of the grand jury, was *coram non judice*, and is no legal foundation for any prosecution which can only be instituted on the presentment or indictment of a grand jury."

To the same effect is *State vs. Hamilton*, 65 Mo. 668, and *State vs. Plummer*, 50 Me. 218. But we hardly think it necessary to cite further authorities upon this question, as it has never been suggested that the authority of the grand jury was any more extensive than that of the court to which it is an appendage, and as shown by the record the only contention at the trial was that the testimony in question was material to the investigation of the Roll matter.

For the reasons which we have already presented, it was far more important than that the matter or issue to which this testimony was claimed to be material should be set forth in the indictment than in the ordinary case, as here the defendant had no possible notice of the matter to which it was claimed to relate.

It is true that there is an allegation in the indictment that the facts to which the alleged false testimony related "became material" before the grand jury and it may be claimed that this is sufficient under section 5396 of the

revised statutes, but we do not think it has ever been understood that this statute in any way affected the right of the defendant to have the case or issue to which the alleged testimony is claimed to be material, set forth in the indictment, and if this statute can be given such a construction then we fall back upon the constitutional provision under which, as we have seen by the authorities already presented, this description of the matter to which the alleged false testimony is claimed to be material is essential, and without which the indictment is void.

(See authorities cited *supra*, page——)

Besides, to what is this indefinite allegation of materiality to be referred? To what investigation before the grand jury did the testimony of Hawk become material? Was it to some "criminal violation of the laws of the United States relating to the public lands" or relating to "the disposal of the same" or relating to "the unlawful fencing thereof" or was it merely material to the "other matters" which the grand jury are alleged to have been inquiring into? To say that the matter to which this testimony related became a "material question" without alleging in any way to *what* it became material, is hardly definite enough to be even a "conclusion."

We respectfully submit to the court that the allegations of this indictment in relation to the matter to which the alleged testimony is claimed to have become material, are so indefinite and uncertain—so entirely wanting indeed, that there is hardly room for contending that the indictment is good either under the constitutional provision or any other principle of correct criminal pleading.

This question was directly raised as a constitutional question and the court below was fully informed that the defendant was standing on his constitutional right by the motion in arrest of judgment which was as follows:

"And now after verdict against the said Hamilton H. Hendricks and before sentence, comes the said Hamilton H. Hendricks, by A. S. Bennett, his attorney and moves the court here to arrest judgment herein, and not pronounce the same, and that further proceedings against the defendant be dismissed, and that he be discharged and go hence without day.

This motion is based upon the ground that the indictment in this case does not charge a crime, and is insufficient and does not sufficiently describe the offense, "And does not inform the defendant of the nature and cause of the accusation," against him and is in violation of and insufficient under the Sixth Amendment to the Constitution of the United States."

Trans. p. 17.

The question of the sufficiency of the indictment was also raised by demurrer. Transcript pages 9 and 10. And by objection to the evidence, transcript page 22.

II.

NOT SUFFICIENT EVIDENCE OF MATERIALITY.

It is too well established to admit of question that the materiality of the alleged false testimony must also be *proven* before a conviction can be sustained,—and we submit to the court that there was no evidence whatever proving or tending to prove that the testimony of Hawk which is alleged to be false, was material to the matter under investigation before the grand jury.

In relation to this matter the learned district attorney went upon the stand himself, and testified as follows:

"A. Yes, sir, and before any witnesses testified. Hawk testified on January 23d, he appeared here on the 19th—before Hawk was sworn—Hawk appeared here the same time Roll did, and they were put before the Grand Jury on the 23d, *and the matter under investigation was the Roll matter*, the unlawful acquiring of public lands in the Roll matter."

"Q. Can you recollect from any paper you have seen lately the number of witnesses that came before you and investigating body in connection with this Butte Creek Live Stock and Lumber Co., matter?"

"A. I have not counted them but we had in the neighborhood of twenty I guess, and the Hawk testimony was taken in there *after it appeared to be beyond the Statute of Limitations*; the testimony was taken for the purpose of gaining knowledge in regard to system and knowledge on the part of Hendricks."

"Q. With reference to the operations which you were daily finding disclosed?"

"A. *With reference to the John Roll case* which was in 1904 and was in the statute of limitations."

(Transcript of record, page 31.)

The whole record so far as it bears upon the materiality of these statements is set forth in the record, and there is a recital to that effect.

"There was no other testimony offered or introduced at said time concerning the subject, or what matters were being investigated by the grand jury at the time of the alleged perjury and no other or further testimony *tending to show the materiality of the statements charged in the indictment to have been falsely sworn to before the grand jury by the witness Hawk.*" (Transcript of record, page 32.

There is not a word of testimony tending to show that the Hawk transaction had any relation whatever or bore in any way upon the Roll matter, and nothing from which it could by any possible chance be inferred that the Hawk transaction had anything to do with or threw any light upon any motive or system as to the Roll transaction, or indeed as to any other transaction which was before the grand jury. So that the doctrine (which we submit has been of late so much overworked) that one offense may be proven when it shows motive or design for the commission of another, has no application.

It is true that there is a possibility (as there always is in such cases, that there may have been some hidden relation between these transactions by which one might throw light upon the other, and it is also true that the learned district attorney stated in his testimony that the Hawk testimony "was taken for the *purpose* of gaining knowledge in regard to system and knowledge on the part of Hendricks," but there was no *proof* as to the relations of the two matters as to each other or that they had any relation to each other whatever.

It is not enough that alleged false testimony *may have been* material. On the contrary, its materiality must be proven and established the same as any other fact in the case.

McClelland vs. People (Colo) 113 *Pacific*, 640.

State vs. Aikins, 32 *Iowa*, 413.

State vs. Deneen, 203 *Mo.* 628; 102 *S. W.* 480.

Koslowski vs State (Mo.) 128 *S. W.* 740.

State vs. Smith, 40 *Kan.* 631.

Banks vs. State, 78 *Ala.* 14.

Commonwealth vs. Pollard, 12 *Metc. (Mass.)* 229

This principle is well illustrated in the very late and carefully considered Colorado case of *McClelland vs People*, 113 *Pacific*, 640, in which it is said:

"To constitute the crime of subornation of perjury, one party must procure another to commit perjury, and the party thus procured must actually commit the crime of perjury, and, to support a conviction therefore, it is essential to allege and prove that perjury has, in fact, been committed by the party so procured. * * *

It is equally essential upon the trial to *prove the facts showing the materiality of the false statements or testimony. The proof should show how and where in the matter upon which the perjury is assigned was material to the issue or point in question.* The rule is aptly stated in *Commonwealth v. Pollard*, 1 *Metc. (Mass.)* 225, 229, where it is said: "The oath must not only be willfully false, but it must be material to the issue; for if it be of no importance and immaterial, though false, it is not perjury, because it does not affect the issue; and it lies on the prosecution to prove that it is *thus material.*"

And in 3 *Greenleaf on Evidence*, p. 197, as fol-

lows: "Where the perjury is assigned in the evidence given in the cause, it will be necessary, not only to produce the record, but to give evidence of so much of the state of the cause, and its precise posture at the time of the prisoner's testifying, as will show the materiality of his testimony." The evidence constituting the alleged perjury must have been material to the matter then being investigated, or the point in question before the court, and it devolves upon the people, upon trial, to show its materiality. While the test of materiality does not require the false testimony to be directly pertinent to the main issue or point in question, it does require that it have a legitimate tendency to prove or disprove some material fact in the chain of evidence; that is, that it be directly or circumstantially material. It is equally true that its materiality must be established by evidence either direct or circumstantial, and cannot be left to presumption."

"It is true the acts covered by Crowder's testimony might have had a legitimate tendency to prove or disprove a material fact in the contributing to juvenile delinquency case, but, in order to show in the case at bar that it was material in that case, it was essential in this to produce the record of that case, and so much of the evidence given therein as to show clearly the materiality of the false testimony."

"The existence of a fact cannot be established by simply showing that it may or may not have existed; nor can it be said the materiality of the alleged false testimony was established, when it appears that under some circumstances such testimony may have been material, and under other circumstances it could not have been."

Also in *State vs. Aikins*, 32 Iowa, 413, the Supreme Court of Iowa says:

"To constitute the crime of perjury the accused

apparent legal objection to it, or for purposes of convenience, or through inadvertence, in the haste of the trial, much of which is immaterial to the issue.

In the case at bar, the averments (with the exception of the allegation as to the interest of the party in the suit) do not appear, on the face of them, to be material, or to bear on the issue to be tried. It was not, we think, sufficient for the government to prove that the words alleged were sworn to before the jury, on a former trial; but there should have been satisfactory evidence that the facts sworn to were material; because the proof of the speaking of the words, and their importance in the cause, are independent of each other.

To adopt the ruling of the court would be changing the nature of the proof, in the substitution of the fact that the evidence was admitted to the jury, instead of proof of its materiality so that it would be sufficient to set forth in the indictment, that the evidence went to the jury, and then prove the fact; thus making its materiality to depend, not on its bearing upon the issue, but on its admission in evidence to the jury."

This was the mistake into which the learned attorney for the government evidently fell. He seems to have supposed that it was enough for him to show that the evidence in question was introduced upon certain issues, or for him to state that it was introduced for a certain "purpose,"—that is, for the purpose of "gaining knowledge in regard to system and knowledge, etc." And that it was not necessary for him to prove that the evidence was actually material to the investigation pending, or that the relation of

the two matters were actually such that the evidence *did* tend to show knowledge or motive.

Whereas in truth it did not make any difference for what *purpose* the evidence was offered, or even what he or the grand jury may have thought as to its materiality, it was necessary for the State to go farther and prove how and why it was material for that purpose, and, as was said by the Supreme Court of Colorado, already quoted, the fact of the materiality could not be "established by simply showing that it may or may not have existed," nor that the materiality of the alleged false testimony was established "when it appears that under some circumstances such testimony may have been material, and under other circumstances it could not have been."

This question of the sufficiency of proof was raised by the defendant's motion to dismiss and nonsuit the case, upon the ground that there was "not sufficient evidence of the materiality of said alleged false statements," and by instruction number 8, as follows: Before you can find the defendant guilty on this charge, it must be proven that the alleged false testimony was material to some investigation before the grand jury, and there is no evidence that it was so material, and you should acquit." (Printed transcript of record, page 32.)

There are many other rulings of the Court of which we complain, and which we think were clearly erroneous, but we shall only tax the time of the Court by particular reference to one other, which is presented by the following questions from the record:

"That thereafter, one J. P. Lucas was called as a witness and having testified that in '99 or 1900 he was Register of the U. S. Land Office at The Dalles, Oregon, (in which land district this land was situated) and that he had examined a certain blue print which was exhibited to the jury, and upon which the lines of the Butte Creek Company's pasture were marked, and having stated that he could state about how much public land there was inside of those lines on the 24th day of October, 1899, was asked the question:"

"Q. And what was the amount?"

"To which the defendant objected as immaterial, and incompetent and not bearing in any way on the charge in this indictment that this defendant suborned William Hawk to commit perjury before the Grand Jury.

But the objection was overruled.

To which ruling the defendant excepted and his exception was allowed. And thereupon the witness answered."

"A. 18,360 acres of unappropriated public land of the United States."

"There was no evidence tending to show that the claim of William Hawk referred to in the indictment was nearer than 14 miles to any point of the Butte Creek pasture, referred to by the witness, and there was no testimony showing or tending to show that the Hawk claim had ever been fenced, or that it was even included in any pasture or made a part of any pasture by any one in any way connected with the Butte Creek Land Live Stock and Lumber Company, or any one in any way connected with the defendant."

"Be it further remembered, that James Loren

Combs being called as a witness in behalf of the Government and as a part of its direct case testified that he lived in Gilliam County, had lived there about 32 years, was 41 years old, had lived in Fossil country and was in the cattle business; his ranch was in section 6 and 7, township 6 range 19 on the John Day river, that his land cornered with the northwest corner of the Butte Creek pasture, the Butte Creek Company's pasture heretofore referred to, that his cattle at one time ran inside of that pasture—that they were running in there at the time it was fenced, that was about the year 1899, that they did not stop running there but ran there during the year 1900 during the fall.

Whereupon the following question was asked:"

"Q. Then what happened?"

"To which the defendant objected to as immaterial, incompetent and not bearing in any way on the charge against the defendant of suborning Hawk to commit perjury before the Grand Jury.

Whereupon Mr. Heney in behalf of the Government stated that it was offered for the purpose of showing motive, and

Thereupon the objection was overruled, and Thereupon the defendant excepted and his exception was allowed."

"Q. What happened in the fall of 1900 to your cattle?"

Same objection, ruling and exception.

—, Well, some time during the fall I went in there to gather some of my cattle and while I was in there Mr. Zachary came to me.

"Q. Cant Zachary?"

"A. Cant Zachary. I was riding alone."

"Q. What did he say?"

Same objection, ruling and exception.

"A. He forbid me riding there alone, he said if I was going to ride alone I could not run my cattle in there."

And thereupon subject to the same ruling, objection and exception, the witness testified as follows:

"Q. What do you mean by riding alone?"

"A. There was no one else riding except me, gathering cattle."

"Q. And then what occurred?"

"A. I quit after I rode the next day, or the day following, I could not say which; I don't believe I rode the next day; I think it was the day after that, and then I didn't ride any more until the next rode, to get the rodero cattle."

"Q. That was the ride of the fall of 1900?"

"A. Yes, sir."

"Q. Did Mr. Zachary ever speak to you about it at any other time?"

"A. Well, never but once, I don't believe afterwards."

"Q. When was that?"

"A. That was some time during the winter; I could not say what month it was."

"Q. Where was it?"

"A. It was in the—A. B. Lamb's drugstore."

"Q. Is that the winter of 1901?"

"A. Yes, sir."

"Q. Was any one else present?"

"A. Yes, sir; there was one party present."

"Q. Who was it?"

"A. That I remember—it was a man by the name of William Griffith."

Whereupon the witness was asked the following question:

"Q. What did Mr. Zachary say then, or what was said then in the presence of Mr. Zachary by you or Griffith of Zachary?"

To which the defendant objected as incompetent immaterial and in no way bearing upon the charge against the defendant of suborning Hawk to commit perjury before the Grand Jury.

But the objection was overruled.

To which ruling the defendant excepted and his exception was allowed.

And the witness answered:

"A. Well, Mr. Griffith asked Mr. Zachary in regard to a cow of his, that I was coming out at the time that I met Mr. Zachary in the pasture, and he asked Mr. Zachary about the cow, if he had seen it. Now, I had put Griffith's cow along with what I had of mine, into Jim King's pasture, and when I went to take the cattle out, I didn't find Griffith's cow. I missed her and Griffith asked Mr. Zachary if he had seen the cow since, and Mr. Zachary said he hadn't, and in our talk, it was brought up about my riding in there, and taking out cattle, and Mr. Zachary said he would not allow any man to ride in there alone, and if he caught anybody riding in there, he didn't say me, but anyone, he would put them out, and Mr. Griffith told him there was too much Government land in there for him to do it, and he said it didn't make any difference how much Government land there was in there; there was no man that should go in there and ride, if he found them in there riding."

Printed Trans. p. 58 to 60.

We submit to the Court, that the fact that a corporation, of which the defendant was a stockholder, four years after the latest event in the Hawk transaction, had a large amount of Government land enclosed in another place fourteen miles away, and entirely separate from the Hawk tract, could not be evidence of a motive for the alleged subornation of the witness Hawk to swear falsely before the grand jury as to his own claim, fourteen miles away,

in an entirely different section, and which had confessedly never been enclosed at all, and that such evidence could not have any legitimate purpose in the case whatever, and that together with the arbitrary actions and talk of Zachary another member of the company, in which he domineeringly refused to let other people's horses and cattle run on the Government land in the pasture, could only have been offered for the purpose of inflaming the minds of the jury against the defendant, and induce them to believe that he was a bad man, who had been guilty of fencing and using a great amount of Government land, and putting them in such a frame of mind that they could not judge the defendant coolly and dispassionately as to the heinous offense with which he was charged in this indictment.

The direct evidence as to whether or not the defendant did suborn Hawk to testify falsely consisted almost entirely of the evidence of the defendant and that of Hawk, the alleged accomplice, and the admission of this testimony (and a great deal of the same class, as fully appears from the record) could not possibly fail to greatly prejudice the defendant, and as we believe and submit to this Court, to prevent him from having a fair trial.

In conclusion, therefore, we respectfully submit to the Court, that the defendant was tried upon an indictment

which was grossly and apparently insufficient to give him an opportunity for his defense and which did not comply with the constitutional requirement—that there was absolutely no evidence that the alleged false testimony was material to any investigation before the grand jury, and that the character of the evidence by which his conviction was secured was such as had no legitimate place in the trial, but was well calculated to arouse against the defendant the passion and prejudice of the jury and which must have been offered for that very purpose.

Respectfully submitted,

ALFRED S. BENNETT,

Attorney for Plaintiff in Error.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1911.

No. 164.

HAMILTON H. HENDRICKS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON.

**ARGUMENT IN REPLY TO BRIEF OF DEFEND-
ANT IN ERROR.**

Insufficiency of Indictment.

It is claimed in the brief on behalf of defendant in error that a number of the essential elements of the crime charged are fully set forth in the indictment. This may be conceded. But this certainly does not cure the omission if the indictment is fatally defective as to some other equally essential element.

We claim that the matter under investigation, and the materiality of the testimony to that matter, is just as essential to subornation of perjury as any other element of the crime.

No attempt is made in the brief of defendant in error to question the application or to in any way distinguish the authorities cited in plaintiff's main brief. We may safely assume, therefore, that those authorities are conceded to be in point.

Certain authorities are cited, however, which are claimed to be more or less in point against our contention.

The object of this reply brief is to show that these authorities are not in point and in no way conflict with the contentions of plaintiff in error, or with the authorities cited in the main brief on his behalf.

Markham Case.—In the case of *Markham vs. United States*, cited by counsel for the Government from the 160 U. S., 319, the court held that the indictment *impliedly charged* that the alleged perjury was in an inquiry *in relation to a claim of the defendant* under the pension laws, and it was upon this ground that it was upheld, the court, by Mr. Justice Harlan, saying: "As the fair import of the count was that the inquiry had reference to a claim made by the accused under the pension law on ground of personal injury received while he was a soldier and made it necessary to ascertain whether the accused had, since the war or after his discharge from the army, received an injury to the forefinger of his right hand, we think that the fourth count, though unskillfully drawn, sufficiently informed the accused of the matter for which he was indicted."

Here the indictment certainly did not imply or disclose in any way, that the matter under investigation before the grand jury was the John Roll homestead claim, or that the con-

that the testimony in question was material collaterally to the John Roll matter, which was in no way mentioned in the indictment.

The distinction then between the Markham case and this case is clear. In that case the matter to which the alleged false testimony was claimed to be material, could be plainly inferred. In this case such inference was absolutely impossible.

Williamson Case.—The case of *Williamson vs. The United States*, 207 U. S., 425, cited in the brief of defendant in error, is not at all in point. In that case the charge was *conspiracy* to suborn perjury, and the court held that the essence of the offense was the conspiracy, and that the purpose to suborn need not be alleged with the same particularity as where the direct charge was subornation. The reasoning in that case, that, as the conspiracy was necessarily uncertain and indefinite as to future and unconsummated details, the indictment could not, in the nature of things, be more definite than the fact, also distinguishes it from this case.

Rosen Case.—The case of *Rosen vs. The United States*, cited by defendant in error, from the 161st U. S., 29, is also not in point. It was a case where the defendant was indicted for sending obscene matter through the mail. The publication was very particularly described, but the obscene matter was omitted as too indecent to spread upon the records of the court. It was held that the indictment was sufficient and that it was not necessary to spread the indecent words and pictures upon the record.

We fail to see how the case in any way supports the contention of the appellee in this case. Mr. Justice Harlan delivering the opinion in that case does say, however, that:

“The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or motion to quash, and, after verdict, *by motion in arrest of judgment*, that the indictment shall apprise him of the crime charged with such reasonable certainty that he may make his defense.”

The Dunbar case cited in the brief of defendant in error is not at all in point. It was a smuggling case and the question in this case in no way arose. The same is true as to the Bannon case and also as to the cases of *Coffin vs. United States*, *Herbert vs. United States*, and *Thompson vs. United States*. None of these cases it is submitted are at all to the point.

The fact that evidential matter which is sometimes necessary to fully inform defendant of mere detail, may sometimes be supplied by bills of particulars certainly does not take away defendant's right to attack an indictment by demurrer and motion in arrest of judgment, when it fails to set forth an *essential element* of the offense (*Rosen vs. United States*, 161 U. S., 29).

Claim That Name of Person Being Investigated Need Not Be Specified.—It is urged in the brief of defendant in error that the name of the person under investigation need not be specified. This may be true when the name is unknown to the grand jury. In this case it appears that the name of the person under investigation *was* known to the grand jury and should in all fairness have been set forth, but even if that might be dispensed with where so known (which we by no means concede) yet it remains that the *matter* under investigation, and to which the evidence is claimed to have been material, clearly must be in some way identified in the indictment.

See authorities cited in main brief of plaintiff in error, page 29.

Hale vs. Henkel.—The case of *Hale vs. Henkel*, 201 U. S., 43, is cited as authority, apparently for the proposition, that in an indictment for alleged perjury before a grand jury, it is not necessary for the prosecution to allege or prove—that the supposed false testimony was material to any particular investigation before that body. But the court in that case certainly neither announced or intimated any such amazing doctrine.

That was a *habeas corpus* case, and the question was whether the appellant could be compelled to answer certain questions without a definite formal charge being first furnished him. The court held that the grand jury was possessed of inquisitorial powers and might investigate any offense or suspected offense which came in any way to their knowledge. This we do not at all question. But it does not at all follow that the necessity of alleging and proving materiality to *some* definite investigation is thereby eliminated. Such a doctrine, we believe, has never been held by any court. It would be in the face of the statute defining perjury, which requires that the false evidence shall be *material*, and it would overturn the long line of Federal and State decisions cited on page 29 of the main brief of plaintiff in error.

The first six of these cases from the Supreme Court of Kentucky, Vermont, Indiana, Alabama, Mississippi, and Texas are cases where the alleged perjury was before the grand jury and all of the 21 cases from 13 different State courts and 2 Federal courts hold directly that the particular matter to which the false testimony is claimed to be material *must in every case be alleged and proven*.

This court is now asked by the learned attorney for the defendant in error to overrule all this long line of cases without the citation by him of a *single definite decision to the contrary*.

Even in an inquisitorial proceeding it would seem that the Government would have to allege and prove that the alleged false testimony was material to *some* matter that was being investigated. Otherwise the rule so long established that materiality was a necessary element of the offense would be entirely dissipated.

But in this case *the matter was not an inquisitorial proceeding*. The indictment charges that the grand jury were then investigating into "certain criminal violations of the laws of the United States * * * which had then *lately been committed*."

The indictment then shows that they were investigating *certain definite offenses*, and at the *trial* it was developed that the offenses they were actually investigating at the time of the alleged perjury was the taking of the John Roll homestead. So it is clear that whatever might be the rule in purely inquisitorial matters, in this case they were investigating a definite offense and the general rule established by the authorities already referred to applies with unquestioned force and there was no reason why the grand jury should not have set forth in the indictment the matter which was being investigated at the time and thus have enabled the defendant to prepare his defense and be in a position at the trial to meet the allegation of materiality as well as the other essential allegations of the indictment.

Allegation of Materiality.—Many authorities are cited in the brief of defendant in error to sustain the form of the allegation of materiality. It will suffice to say under this head, that the plaintiff in error does not particularly attack this

form of allegation, if it was coupled (as it usually is), with an allegation, either direct or implied, showing the matter to which it is claimed to be material. But to allege it to be material without alleging in any way, *to what it is material*, is equivalent to no allegation of materiality at all.

Here there was no direct allegation, that it was material to anything, and the only implication which could possibly be indulged would be that it was material to some one of the 100 or more possible offenses which came within the dragnet clause of the indictment; that the grand jury were "amongst other matters inquiring into certain criminal violation of the laws of the said United States relating to the public land and the disposal of the same and the unlawful fencing thereof."

As we have shown in the main brief, page 35, this may have covered any one of a vast number of distinct offenses violating many independent statutes, and committed anywhere within the district of Oregon by any one of the inhabitants of the district.

II.

Claim of Waiver.—It is claimed that the objections to the indictment, although otherwise valid, have been waived by the defendant. But this claim is clearly based upon a misconception of the record.

The sufficiency of the indictment upon this ground was directly challenged by demurrer immediately upon the arraignment of the defendant (Record, pages 9 and 10), and again upon the introduction of evidence (Record, page 22), and still again upon motion to arrest (Record, page 17).

The plaintiff in error did not "lay by for seven years" or at all. On the contrary, he was early and often and continually, when an opportunity offered, protesting against the sufficiency of the indictment. It is true, that the sanctity of the constitutional provision, while impliedly involved at every step, was only directly invoked on the motion in arrest of judgment. But this was entirely sufficient to raise that question.

Rosen vs. United States, 161st U. S., 31.

And this brings all the other questions presented by the record before this honorable court.

Burton vs. United States, 196 U. S., 283.

Williamson vs. United States, 207 U. S., 425.

III.

It is claimed in the brief of defendant in error that the materiality of the alleged false evidence was proven by the evidence of the United States Assistant Attorney in the court below. But we submit that there is no such evidence—noth-

ing in the world to show how or why or in what manner the evidence was material to the Roll matter under investigation. Nothing whatever but the personal opinion of Mr. Heney that it was introduced for a certain purpose, without showing in any way how it bore upon that purpose. And, however learned or great a lawyer Mr. Heney may be, we can hardly be expected to concede that his personal opinion took the place of the evidence upon this point which is necessary under the authorities cited on page 45 of the main brief of plaintiff in error.

Respectfully submitted,

ALFRED S. BENNETT,
Attorney for Plaintiff in Error.